1990

United Park City Mines Company v. Greater Park City Co., Royal Street Land Co., Deer Valley Resort Co., Royal Street Of Utah, Royal Street Development Co., Atlantic Richfield Co., Formerly The Anaconda Co., Asarco, Inc., Morgan Guaranty Trust Company Of New York, Fidelity Bank Of Philadelphia, Greater Properties, Inc., Park Properties, Inc., Alpine Meadows Of Tahoe, Inc. : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

UNITED PARK CITY MINES COMPANY, a Delaware corporation,	
Plaintiff and Appellant,	
v.	Case No. 900306
GREATER PARK CITY CO., a Utah corporation; ROYAL STREET LAND CO., a Utah corporation; DEER VALLEY RESORT CO., a Utah limited partnership; ROYAL STREET OF UTAH, a Utah corporation; ROYAL STREET DEVELOPMENT CO., a California corporation; ATLANTIC RICHFIELD CO., a Delaware corporation, formerly THE ANACONDA CO., a Montana corporation; ASARCO, INC., a New Jersey corporation; MORGAN GUARANTY TRUST COMPANY OF NEW YORK, a New York corporation; FIDELITY BANK OF PHILADELPHIA, a Pennsylvania corporation; GREATER PROPERTIES, INC., a Delaware corporation; PARK PROPERTIES, INC., a Delaware corporation; ALPINE MEADOWS OF TAHOE, INC., a California corporation,	Priority Number 16
Defendants and Appellees,	
WELLS FARGO BANK, N.A.,	
Intervenor and Appellee.	

BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County,
The Honorable Pat J. Brian, presiding

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MISCELLANEOUS

Plaintiff-appellant United Park City Mines Company ("United Park") appeals from the judgment of the Third Judicial District Court dismissing United Park's Amended Complaint against defendant-appellees Atlantic Richfield Company ("ARCO"), successor to The Anaconda Company ("Anaconda"); ASARCO, INC. ("ASARCO"); Greater Park City Company ("GPCC"), and its parent, Alpine Meadows of Tahoe, Inc. ("AMOT"); Royal Street Land Company, Deer Valley Resort Company, Royal Street of Utah and Royal Street Development Company, Inc. (collectively "Royal Street"); Morgan Guaranty Trust Company of New York ("Morgan"), Fidelity Bank of Philadelphia ("Fidelity"), and their wholly owned subsidiaries Greater Properties, Inc. ("GPI"), and Park Properties, Inc. ("PPI") (collectively "Morgan-Fidelity"); and intervenor-appellee Wells Fargo Bank, N.A. ("Wells Fargo").

INTRODUCTION

In 1975, Anaconda (now ARCO) and ASARCO, United Park's controlling shareholders, caused United Park to enter into a number of interrelated contracts and leases (the "1975 Resort Agreements"), which gave away for essentially nothing United Park's major equity interest in GPCC, including the profitable Park City Ski Resort operations and facilities, the planned development of the Deer Valley resort area, and other valuable developable real property and water rights. Anaconda and ASARCO did so, to the great detriment of United Park and its other shareholders, because they decided in late 1974 that the ski resort and land development business was a distraction from their paramount corporate interest -- mining -- and that United Park would "get out of the resort business." They gave away United Park's major equity interest in these ski resorts and their great potential, to concentrate on and to protect their discrete and disproportionate interests in Park City Ventures, a joint venture conducting mining operations on United Park's property. Through these actions, Anaconda and ASARCO breached their fiduciary duties as controlling shareholders to United Park and its other shareholders.

Royal Street and Morgan-Fidelity also owed fiduciary duties to United Park as co-shareholders with United Park in GPCC, a closely-held corporation, and breached those duties by obtaining unfair advantage over United Park in the 1975 Resort Agreements. GPCC and AMOT aided and abetted the fiduciary duty breaches by Anaconda, ASARCO, Royal Street and Morgan-Fidelity to their financial advantage. Anaconda and ASARCO, assisted by the other defendants, concealed material facts regarding the 1975 Resort Agreements from United Park's outside shareholders.

In August 1985, for the first time in its history, United Park had a Board of Directors and management independent of Anaconda and ASARCO. Prior to that time, United Park's Board was controlled by Anaconda and ASARCO through employees, former employees, attorneys, bankers, and persons who, due to business, contractual and historical relationships with Anaconda and ASARCO and other conflicts of interest, would not act independently for the best interests of United Park. After new management arrived in August 1985, certain apparent violations of the Resort Agreements by GPCC and Royal Street ultimately led new management to investigate the circumstances surrounding the 1975 Resort Agreements. That investigation was difficult because many critical documents were not in United Park's files and certain key witnesses, affiliated with defendants, refused to talk to United Park management.

The district court erroneously held that United Park's fiduciary duty claims are time-barred as a matter of law, because United Park discovered or should have discovered the claims through outside shareholders and independent directors in 1975. The critical fact issue in deciding whether United Park's fiduciary duty claims are time-barred is whether, in the exercise of reasonable diligence, United Park's outside shareholders could have discovered these claims prior to new management's arrival in August 1985. The combination of control by Anaconda and ASARCO, the directors' involvement in the wrongdoing and defendants' concealment of certain critical facts, made it not possible, through reasonable diligence, for the claims to have been discovered or asserted earlier. In all events, that issue and several others raised by defendants' motions to dismiss and for summary judgment were issues of fact. The district court committed clear error in dismissing United Park's Amended Complaint as a matter of law. At a minimum, United Park should have been permitted to complete necessary discovery.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2 (3)(j) (1953, as amended).

ISSUES FOR REVIEW

1. Did the district court err when it granted summary judgment in the face of United Park's affidavit, filed pursuant to Utah R. Civ. P. 56(f), which demonstrated United Park's need for additional discovery on the statute of limitations, breach of fiduciary duty and breach of contract issues?

2. Did the district court err in granting summary judgment dismissing United Park's claims for breach of fiduciary duty in connection with the 1975 Resort Agreements, as barred by the statute of limitations, when there are genuine issues of material fact as to whether United Park discovered or in the exercise of reasonable diligence could have discovered its fiduciary duty claims in 1975 or anytime prior to new management's arrival in 1985?

3. Did the district court err in granting summary judgment dismissing United Park's claims for breach of fiduciary duty as barred by the Bangor Punta doctrine, even though (1) Anaconda and ASARCO owned and sold only 31% of the United Park stock; (2) only the Loeb Investors Company XL ("Loeb") purchased any stock from Anaconda or ASARCO; (3) defendants' presented no evidence that United Park would receive a windfall from a recovery from Anaconda or ASARCO; and (4) the Bangor Punta doctrine

has no application to claims against non-selling third parties?

4. Did the district court err in granting summary judgment dismissing United Park's breach of fiduciary duty claims against Anaconda and ASARCO based on the bald, unsupported conclusion that "[n]o genuine issues of material fact exist regarding [United Park's] allegations against Anaconda and ASARCO," when United Park alleged and presented evidence of the breaches of duty, and Anaconda and ASARCO did not even seek summary judgment on this ground?

5. Did the district court err in dismissing, pursuant to Utah R. Civ. P. 12(b)(6), United Park's claims against AMOT and GPCC for aiding and abetting breaches of fiduciary duty, when the tort of aiding and abetting fiduciary breaches is clearly recognized and there are genuine issues of material fact as to whether these defendants are liable for that tort?

6. Did the district court err in granting defendants' motions to dismiss or for summary judgment dismissing United Park's prayer for reformation of the Resort Agreements?

7. Did the district court err in granting defendants GPCC and Royal Street summary judgment dismissing United Park's claims that GPCC and Royal Street breached the Resort Agreements?

8. Did the district court err in granting summary judgment dismissing United Park's trespass claims against GPCC?

STANDARD OF REVIEW

The standard of review for the district court's refusal to permit United Park to complete discovery is abuse of discretion. Where, as here, the non-moving party makes a showing under Rule 56(f) that additional discovery is relevant to the issues on summary judgment and that the request for more time to complete discovery is not dilatory, it is an abuse of discretion for the court to deny the opportunity to complete discovery. <u>Cox</u>

v. Winters, 678 P.2d 311, 312-15 (Utah 1984); Strand v. Associated Students of Univ. of Utah, 561 P.2d 191, 193-94 (Utah 1977).

The standard of review of the district court's grant of summary judgment under Rule 56 is a de novo determination whether, after construing all facts and reasonable inferences in the light most favorable to United Park, defendants, the moving parties, demonstrated the absence of any genuine issue of material fact and their entitlement to judgment as a matter of law. Since summary judgment is granted as a matter of law, this Court gives no deference to the district court's legal conclusions. Utah R. Civ. P. 56(c); Blue Cross & Blue Shield v. State, 779 P. 2d 634, 636 (Utah 1989); Barber v. Farmers Ins. Exchange, 751 P.2d 248, 251 (Utah App. 1988).

The standard of review for the district court's grant of a motion to dismiss under Rule 12(b)(6) is the de novo determination as to whether, assuming the truth of United Park's allegations, the Amended Complaint, as a matter of law, fails to state any valid claim for which relief can be granted. Utah R. Civ. P. 12(b)(6); see Conley v. Gibson, 355 U.S. 41, 45-46 (1957); 5 C. Wright & A. Miller, Federal Practice & Procedure § 1357 at 600-04 (1969); see also Davis v. Payne & Day, Inc., 348 P.2d 337, 338 (Utah 1960).

DETERMINATIVE PROVISIONS

Sections 78-12-25(3) and 78-12-27, Utah Code Ann. (1953, as amended); Utah R. Civ. P. 12(b)(6), and 56(c) & (f).[1]

STATEMENT OF THE CASE

The Parties

Plaintiff-appellant United Park, a Delaware corporation maintaining its principal place of business in Salt Lake City, Utah, is a public company with more than 5,000 shareholders. United Park is the successor of mining companies which, since the

[1]Pursuant to Utah R. App. P. 24(f), these provisions and the district court's Findings of Fact, Conclusions of Law, and Orders are reproduced in the Addendum.

nineteenth century, operated mines around Park City, Utah. Due to adverse market and technological conditions, United Park has not actively mined its properties since 1982, but these conditions are dynamic and may permit renewed mining activity in the future. United Park continues to maintain its mill and mining properties. In 1963, United Park began operating the Park City Ski Resort. In 1971, United Park entered into interrelated contracts and leases conveying to GPCC the resort facilities, and certain water and real property rights.

Defendant-appellee ARCO, a Delaware corporation, merged with Anaconda in 1977. The now merged Anaconda/ARCO interests are referred to as "Anaconda." At all material times, Anaconda was engaged in the mining business. From 1953 until 1985, Anaconda was a controlling shareholder of United Park. Defendant-appellee ASARCO is a New Jersey corporation also engaged in mining. From 1953 until 1985, ASARCO was a controlling shareholder of United Park.

Defendant-appellee GPCC is a Utah corporation which has operated the Park City Ski Resort and engaged in land development since 1971. Between 1971 and 1975, GPCC was a closely-held corporation owned by United Park, Royal Street, Morgan-Fidelity and Unionamerica. As a result of the 1975 Resort Agreements, GPCC became a wholly-owned subsidiary of defendant-appellee AMOT, a Delaware corporation. Nicholas Badami ("Badami") is the President of AMOT and the Chairman of GPCC.

The defendants-appellees collectively referred to as "Royal Street" are several related entities owned or controlled by Edgar Stern. Deer Valley Resort Company ("Deer Valley") is a Utah limited partnership which operates the Deer Valley Ski Resort. Royal Street of Utah ("RSU"), a Utah corporation, is the general partner of Deer Valley. Royal Street Land Company ("Land"), a Utah corporation engaged in the ski resort and land development businesses, which owns virtually all of the stock of RSU, has effective control over RSU and, through RSU, control over Deer Valley. Royal Street Development

Company, Inc. ("RSDC") is a California corporation and is the affiliate and alter ego of Deer Valley, RSU and Land. RSDC was a shareholder of GPCC from 1971 to 1975 and operated GPCC during that period under a Management Agreement.

Defendant-appellee Morgan is a New York corporation engaged in banking. Defendant-appellee Fidelity is a Pennsylvania corporation engaged in banking. Defendants-appellees GPI and PPI are Delaware corporations wholly owned by Morgan and Fidelity on behalf of certain commingled pension trusts of which Morgan and Fidelity are Trustees. GPI and PPI were incorporated by Morgan and Fidelity in 1975 to receive a percentage of ski lease income from revenue generated by GPCC at the Park City Ski Resort and to own the ski resort base facility. Morgan, Fidelity, GPI and PPI are sometimes referred to collectively as "Morgan-Fidelity."

Intervenor-appellee Wells Fargo has loaned money to Royal Street and its loans are secured by mortgages on certain real and personal property.

Nature of the Case and Course of Proceedings

In May 1986 United Park filed its initial Complaint against GPCC and Royal Street alleging fraud and contract breaches. United Park filed an Amended Complaint in June 1988. The Amended Complaint added as defendants Anaconda, ASARCO, AMOT and Morgan-Fidelity.

United Park's Amended Complaint (R. 2760-2848) contains Twelve Claims for Relief. The First and Second Claims seek damages from Anaconda and ASARCO, United Park's controlling shareholders, for breaches of their fiduciary duties of loyalty, fairness and care in causing United Park to enter into the unfair 1975 Resort Agreements. The Third Claim asserts that GPCC, AMOT, Royal Street and Morgan-Fidelity aided and abetted Anaconda's and ASARCO's breaches of duty and seeks damages and equitable remedies. The Fourth Claim asserts that Royal Street and Morgan-Fidelity breached fiduciary duties they owed to United Park as co-shareholders in GPCC, and that AMOT aided and abetted those breaches. The Fifth and Sixth Claims allege contractual and lease breaches by GPCC and Royal Street. The Seventh Claim alleges trespass by GPCC on United Park's land. The Eighth and Ninth Claims against GPCC and Royal Street, respectively, seek to remedy underpayment of ski lift revenues owing to United Park. The Tenth Claim alleges that GPCC violated its duty of good faith in its contractual relations with United Park. The Eleventh Claim, against Morgan-Fidelity, seeks a declaration of Morgan-Fidelity's rights under the 1975 Resort Agreements. The Twelfth Claim, against GPCC and Royal Street, seeks reformation of the Water Agreement to permit United Park to use its 2850 gallons per minute reservation for all purposes.

Before any responsive pleadings to the Amended Complaint were filed and before any significant discovery could be obtained from Anaconda and ASARCO, or completed with the other parties, Anaconda and ASARCO filed motions to disqualify United Park's counsel. (R. 2920-36; 3119-90) These disqualification motions, although ultimately denied, (R. 3509-22; 3523-36) stayed discovery on the merits of United Park's claims through November 1989. (R. 3640-51)

In December 1989, immediately after the stay was lifted, defendants filed motions to dismiss or for summary judgment. (R. 3682-3874 (GPCC); 3875-78, 4384-4404 (Morgan-Fidelity); 3879-3922 (ASARCO); 3923-4127 (ARCO); 4128-4383 (Royal Street); and 4405-34, 4505-07 (AMOT); 4449-4497 (Wells Fargo)) United Park filed a lengthy memorandum (R. 4523-4728) together with six affidavits (R. 4729-4867) and several volumes of exhibits (R. 4868-6777) which clearly demonstrated the existence of genuine issues of material fact precluding summary judgment. One affidavit, submitted pursuant to Utah R. Civ. P. 56(f), demonstrated that significant and relevant discovery had not been completed. (R. 4862-67) The district court heard argument on all pending motions on April 4, 1990. On April 12, 1990, the court issued Memorandum Decisions granting defendants' motions to dismiss and for summary judgment essentially in their entirety. (R. 7651-97)

On May 15, 1990, over United Park's written objections (R. 7701-54), the district court entered Findings of Fact, Conclusions of Law and Orders, drafted by defendants. (R. 7821-48; 7851-56) The Orders dismissed United Park's Amended Complaint with prejudice in its entirety as to all defendants except GPCC, and dismissed all claims with prejudice as to GPCC except for one factually distinct claim. Id. By Order of May 30, 1990, the district court directed entry of final judgment against United Park pursuant to Utah R. Civ. P. 54(b). (R. 7881-82)

The district court held, as a matter of law, that (1) United Park's claims challenging the 1975 Resort Agreements were barred by the three-year statute of limitations in Utah Code Ann. § 78-12-27 or the four-year limitation in § 78-12-25(3) because United Park knew or should have known of its claims in 1975; (2) the claims challenging the 1975 Resort Agreements were barred by the doctrine of Bangor Punta Operations, Inc. v. Bangor & Aroostock R.R. Co., 417 U.S. 703 (1974) ("Bangor Punta"); (3) no genuine issues of fact existed as to United Park's claims against Anaconda and ASARCO; (4) United Park had failed to state claims against GPCC or AMOT for aiding and abetting breaches of fiduciary duty; (5) United Park's claim for reformation of the Resort Agreements was barred due to United Park's acceptance of payments under the Agreements or because of the Wells Fargo Estoppel Certificates; (6) GPCC's breach of the Water Agreement had been cured by payment of the price owing under that agreement and that United Park's other claims for breach were not breaches or had been cured or waived; and (7) GPCC has not committed trespass through the construction of a ski lift tower and maintenance building on United Park property.

The district court committed fundamental and sweeping error. In its haste to be rid of United Park's Amended Complaint, the court denied United Park the right to complete discovery, misapplied the standards governing summary judgment and motions to dismiss, and resolved critical disputed factual issues and inferences in defendants' favor.

STATEMENT OF FACTS

The following statement of facts provides this Court with an understanding of the Agreements at issue, the relationships among the parties, and the facts that support the allegations in United Park's Amended Complaint. To avoid repetition, the facts that directly controvert the district court's findings are stated in detail in the Argument.

Anaconda's and ASARCO's Control of United Park

When United Park was formed by consolidation in 1953, Anaconda and ASARCO acquired a combined 24% equity interest. By 1972, their interest in United Park had increased to 32%. Anaconda and ASARCO generally voted their stock as one block and were able to effectively control United Park from 1953 until the summer of 1985 when they sold their shares to Loeb. Through 1982, Anaconda and ASARCO each elected two of their employees to the seven-member United Park Board, thereby effectively controlling the Board.[2] (R. 4818-20) All significant actions by United Park's Board were either at the direction or with the consent of Anaconda and ASARCO. Anaconda's representative on United Park's Board and counsel for Royal Street have admitted that Anaconda and ASARCO controlled United Park in 1975. (R. 7922 at 24; 7930 at 104)

United Park's three outside directors were usually individuals with prior or existing business or professional relationships with Anaconda or ASARCO, such as retired employees, attorneys, bankers and mining consultants. In 1975 the three outside directors were Harold Steele, President of First Security Bank, Miles Romney, a mining consultant,

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[2] In 1981, Wheeler M. Sears, president of Cimarron Corp., joined United Park's Board. In 1982, one of Anaconda's employees on the board, Clark Wilson, was replaced by Ivan Yerger, also a representative of Cimarron Corp. Anaconda's other employee on the Board, Herbert Weed, retired from Anaconda in 1982, but remained on United Park's Board as an "independent" director. (R. 4113) Between 1982 and 1985, Cimarron pursued a merger with United Park, which required the support and approval of Anaconda and ASARCO. (R. 4770-75) Cimarron entered successive option agreements in 1981 and 1984 to purchase Anaconda's shares in United Park. (R. 4771-72, 4774-75) Cimarron representatives could take no action in conflict with the interests of Anaconda or ASARCO, who continued in effective control of United Park through 1985.

and S. N. Cornwall, formerly a member of the law firm of VanCott, Bagley, Cornwall & McCarthy ("the Vancott firm").

In 1985, Anaconda and ASARCO sold their entire interest in United Park, approximately 1,681,549 shares, to Loeb for $3,978,034, or approximately $2.37 per share (R. 4737). In 1975, United Park stock traded at or substantially below $2.37 per share Id. Loeb is the only United Park shareholder to have purchased stock from Anaconda or ASARCO. United Park's other shareholders, representing approximately 68% of the outstanding shares, did not purchase shares from any defendant. (R. 4736-37; 6962) Regardless of the outcome of this litigation, it is unlikely that United Park will be able to pay a dividend in the foreseeable future (R. 4737).

The 1971 Resort Agreements and Creation of GPCC

Over the years, United Park acquired vast acreage and water rights in and around Park City, including the Deer Valley area. This property presented an excellent opportunity for a major ski resort, which United Park began to develop in the early 1960's. The Park City Ski Resort, then known as the Treasure Mountain Resort, opened in late 1963 with base and summit facilities, chairlifts and a gondola, and approximately 27 miles of ski runs. United Park also developed a nine-hole golf course adjacent to the base facilities. (R. 4737-38) Resort operations grew each year, but additional development was required to establish Park City as a destination resort and realize its full profit potential. (R. 6305-07)

In 1970, Edgar Stern of Royal Street made a proposal to Anaconda and ASARCO to expand and develop United Park's resort properties. Stern proposed a partnership in which United Park would contribute the land and water, including its existing Park City ski operations and resort properties. Royal Street would manage and develop the resort, and would find a third partner to contribute capital. (R. 7930 at 41-6; 7946 at 64-8) Anaconda and ASARCO agreed to Stern's proposal. For tax reasons, the parties formed a closely-held corporation -- GPCC -- instead of a partnership, and agreed that United Park would sell its resort operations, real property, and other property rights to GPCC. (R. 7946 at 62-4) In May 1970, United Park and GPCC entered an Option Agreement (R. 6258-86), which provided that if GPCC obtained $4,500,000 from the contemplated financial partner, the following agreements would be executed:

Land Purchase Agreement ("Land Agreement"). United Park would sell to GPCC approximately 4,200 acres suitable for commercial, condominium and subdivision development, together with the base resort facilities, golf course and other resort improvements for $5,400,000 payable over time. (R. 4872-5016) These terms were very favorable for GPCC. (R. 4740-41)

Ski Area Leases ("Ski Leases"). United Park would lease to GPCC 432 acres under the Crescent Ridge Lease, 47 acres under the Deer Valley Lease, and 5,631 acres which included the then-existing ski runs under the Resort Area Lease. (R. 5167-88, 5217-38, 5307-41) Each Ski Lease had an initial 20-year term and one additional 20-year extension. United Park would receive only 1% of the first $100,000 of ski lift revenue and one half of one percent (.5%) of the lift revenue over $100,000 for the first 20-year term with a one-half of one percent increase during the extension. This 40-year term and minimal rental was extremely favorable for GPCC even in contrast to public land leases, which generally have lower rentals than private land leases. (R. 4740-41)

Water Rights Purchase Agreement ("Water Agreement"). United Park would sell certain valuable water rights to GPCC for $500,000 over time, but title would not pass until the other agreements were fully performed. (R. 5087-5116) United Park reserved the prior right to use 2850 gallons per minute from certain of the water rights for "mining, milling and related purposes." (R. 5089)

The Land and Water Agreements and the Resort Area Lease each included a "cross-default" provision which entitled United Park to declare a default on the other two agreements if GPCC defaulted under any one of them. (R. 4899-4905; 5101; 5318-19) The cross-default provisions were to protect United Park so that United Park could reclaim a viable, operational ski resort if GPCC defaulted on any portion of the related agreements. (R. 4804-05; 4743-44) In return for conveying its ski resort, land and water rights to GPCC on such favorable terms, United Park received the right to participate as a major equity owner in the growth and development of Park City as a destination ski resort through an option to purchase up to 900,000 shares of GPCC's common stock and 900,000 shares of preferred stock over three years. (R. 6303)

The 1971 Resort Agreements were approved by United Park shareholders, effective January 1, 1971. In mid-1972, Royal Street obtained the contemplated financial partner, Morgan-Fidelity, which together invested $4,000,000 in GPCC unsecured subordinated notes. In 1973, Morgan invested another $1,500,000 in GPCC unsecured subordinated notes. (R. 6397-98) Between 1972 and 1974, United Park purchased 900,000 shares (39%) of GPCC common stock and 900,000 shares (some two-thirds) of GPCC preferred stock, paying a total price of $972,000. (R. 5499) Royal Street acquired 24% and Morgan-Fidelity 20% of GPCC's common shares. (R. 6477)

<u>Royal Street's Mismanagement of GPCC and GPCC's Default</u>

In 1971, Royal Street began operating GPCC and developing the United Park properties subject to the Land Agreement. Unionamerica, a California lending institution, provided interim financing for the construction of condominiums and commercial business properties. (R. 6397-8; 6478A) Between 1972 and 1974, Unionamerica made secured loans to GPCC at three to six percent over the prime rate, and purchased a small number of shares in GPCC. (R. 7946 at 113-17) The land development and resort expansion, along with the growing success of the skiing operations, greatly enhanced the value of the real property, both developed and undeveloped, that United Park had contributed to GPCC. (R. 6392-93) Revenue from skiing continued to increase and generated significant profits, and the number of actual skier days rose dramatically as Park City became a destination ski resort. (R. 6393) During the 1973-74 and 1974-75 ski seasons, the resort earned profits of more than $1 million each year, and accounted for one-third of Utah's ski market. (R. 4754; 6390)

Throughout much of 1972, 1973 and 1974, however, Royal Street committed serious management errors, including over-expansion, negligent construction practices, construction cost overruns and continually unsound debt/equity ratios, which, when combined with rising interest rates, generated substantial book losses for GPCC. (R. 6390; 7954 at 26-7; 7921 at 130-32) Despite the successful expansion and profitability of the ski resort operations, Royal Street's land development projects generated such large losses and so impaired cash flow that by the summer of 1974 GPCC was highly-leveraged and unable to service its growing debt, then in excess of $20 million. (R. 6390; 7921 at 81-2; 7947 at 260-61; 7973, Ex. 21 at 827) In July 1974, Royal Street requested and received from GPCC's common stockholders a $2 million loan, pro rated in accordance with their stock ownership, until a long-term financial solution was found.

In early 1975, GPCC failed to make substantial payments due United Park under the Land and Water Agreements. GPCC claimed that it was unable to make the payments, but it continued to make payments on other land purchase contracts with third parties. (R. 4748-49; 4782) Due to GPCC's defaults, United Park was entitled under the cross-default provisions to terminate all of the 1971 Resort Agreements, take possession of the Park City resort facilities and all other unconveyed properties subject to the Land Agreement (some 2,278 acres), all water rights subject to the Water Agreement, all real property subject to the Resort Area Leases and have the Deer Valley and Crescent Ridge Leases deemed non-exclusive. See supra at 12-13.

Anaconda's and ASARCO's Breach of Duty

In 1970, Anaconda and ASARCO formed a joint venture, Park City Ventures, to mine United Park's properties. As controlling shareholders, Anaconda and ASARCO caused United Park to lease to Park City Ventures all of its mining property and equipment. Under the lease, Anaconda and ASARCO were to receive two-thirds of the net mining profits. (R. 6291-93) Because of their holdings in Park City Ventures, Anaconda's and ASARCO's interests in United Park differed from the interests of United Park's other shareholders. (R. 7954 at 110; 7930 at 105, 112) With the Park City Ventures Mining Lease and the 1971 Resort Agreements, United Park was transformed into a holding company wholly dependent on Park City Ventures, operated by Anaconda and ASARCO, and on GPCC, operated by Royal Street. (R. 4744)

In late 1974, Anaconda and ASARCO decided to cause United Park to get out of the ski resort and land development business. Clark Wilson, one of Anaconda's employees on the United Park and GPCC Boards, admitted in deposition that in 1975 Anaconda and ASARCO controlled United Park, and that it was their "policy" to "get out of the resort business" because their first interest was mining. (R. 7930 at 104-5) Wilson testified that Anaconda was very anxious to protect the mineral property (R. 7932 at 475), and believed that a threatened bankruptcy of GPCC could have a negative impact on the Park City Ventures mining lease. (R. 7932 at 474-76) Anaconda's principal goal was to protect the mining lease, and Wilson's first duty to Anaconda was to make sure that United Park did not do anything during any restructuring of GPCC that would interfere with the mining lease. (R. 7930 at 104-5, 112; 7932 at 473) "[A]nything we thought we could arrive at for the interests that Anaconda and ASARCO represented had to be cleared in New York." (R. 7932 at 411). Wilson also conceded that, with respect to United Park's surface assets, the interests of Anaconda and ASARCO differed from the interests of United Park's other shareholders. (R. 7930 at 112) Anaconda and ASARCO refused to allow United Park to preserve its equity in GPCC or its interest in the resort's property and other assets, even though they knew that the value of the resort and the real property that United Park had contributed to GPCC had increased greatly since 1971. In a memorandum to the Anaconda files dated March 26, 1975, for example, Wilson wrote that the "value of the properties is now much greater than in the [1971] UPC contract, perhaps 10 times." (R. 6467)

Royal Street's and Morgan-Fidelity's Breach of Duty

During 1974 and early 1975, Royal Street, Morgan-Fidelity and Unionamerica held discussions about restructuring GPCC to relieve its debts and realize its future growth potential. Royal Street, Morgan-Fidelity and Unionamerica[3] knew that United Park was controlled by Anaconda and ASARCO, and that Anaconda and ASARCO had no interest in preserving United Park's interests in the ski resort but were concerned solely with protecting their mining interests. Gilbert Butler, Morgan-Fidelity's representative in the restructuring of GPCC, testified in deposition that Anaconda and ASARCO "had zero interest in the future of the ski area, zero," and were "very, very serious about trying to protect their mining rights." (R. 7954 at 109-10) Butler testified that the focus of the mining companies was almost exclusively on the mining and the protection of the mining interests and what they had coming under the old 1971 agreements. Id. The mining companies did not attempt to obtain anything more than that (R. 7954 at 110-11), because "they basically wanted to protect their mine and protect their principal." (R. 7954 at 112) Consequently, Morgan "never really had any cause to negotiate very much" with Anaconda and ASARCO. Id. Donald Prell, Unionamerica's representative, also testified in deposition that United Park "wanted to be sure that down the road they collected these funds" they were owed on the 1971 agreements. "They didn't want to

[3]Unionamerica, which went out of existence in 1983, is not a party to this action.

wind up getting back" the resort properties because they "had the subsurface, the mines that they wanted, obviously, to keep." (R. 7921 at 49)

Royal Street, Morgan-Fidelity, and Unionamerica thus knew that Anaconda and ASARCO would agree to restructure GPCC on terms grossly unfair to United Park to protect Park City Ventures. (R. 7954 at 110, 148; 7930 at 104-5, 112) Royal Street, Morgan-Fidelity, and Unionamerica were each willing to restructure GPCC but only if each received substantial equity, property, or participation in the growth of the resort. By spring 1975, Royal Street, Morgan-Fidelity, and Unionamerica agreed to a division of GPCC's assets that enabled each to obtain its objectives.

Unionamerica and Morgan-Fidelity had lost confidence in Royal Street's ability to manage the ski resort. Unionamerica decided not to provide capital to restructure GPCC, and to require satisfaction of its secured loans to GPCC and receive something for its equity. (R. 7921 at 127; 7953 at 73-4) Morgan-Fidelity recognized that the successful ski resort would be very profitable in the hands of competent management. Therefore, Morgan-Fidelity determined to convert their unsecured investment in GPCC to an ownership interest in the ski resort facilities and the ski mountain leasehold, which would provide them a large percentage of the ski lift revenue generated by new management. Morgan-Fidelity also determined to have United Park extend the terms of the Ski Leases on the same highly favorable rentals that United Park had given GPCC originally so that Morgan-Fidelity could reap those large profits for as long as possible. (R. 7954 at 49-50, 55, 121) Morgan-Fidelity threatened a GPCC bankruptcy if United Park did not agree to at least two 20-year extensions. (R. 6373; 7954 at 55, 144)

Royal Street wanted to develop all of the properties that United Park had contributed to GPCC, and had plans to develop the Deer Valley properties as a new and exclusive resort. (R. 4790-91; 4859-60; 7946 at 93; 7921 at 34) Like Anaconda and ASARCO, Royal Street knew that the real property United Park had contributed to GPCC had increased greatly in value. In spring 1975, Royal Street prepared prospectuses for GPCC stating the residual values of the United Park properties at $37.8 million, excluding the Park City Resort base facilities, golf course, and water rights. (R. 6529) The prospectuses valued United Park's Deer Valley properties alone at more than $15 million. (R. 6521; 4751-52) Royal Street insisted that it receive United Park's Deer Valley properties, other properties near the resort facilities and Thaynes Canyon, and certain water rights, as part of any restructuring. (R. 7954 at 53; 7921 at 34)

Royal Street, Morgan-Fidelity and Unionamerica rejected alternatives for restructuring GPCC inconsistent with their objectives[4] and sought an experienced operator to run the Park City Ski Resort. In early 1975, Royal Street negotiated with Vail Associates, the operator of the Vail Colorado ski resort, and Disney Properties of California. (R. 7921 at 110; 7954 at 51; 7940 at 33) Royal Street made clear that the Deer Valley properties were unavailable because Royal Street intended to retain these properties for itself. (R. 7954 at 53; 7921 at 34) Disney was not interested in this limited investment without developable real estate (R. 7940 at 33-34), and Vail indicated that for internal reasons it could not make a decision for several months. (R. 7975,

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[4]In fall 1974, GPCC requested Salomon Brothers, Inc. ("Salomon"), a prominent New York investment banking house, to analyze and recommend possible methods of recapitalizing GPCC. Salomon developed a number of recapitalization plans in which each of United Park's shareholders maintained its equity interest. The plans were designed to enable GPCC to meet its future obligations, with an appropriate margin of safety, assuming no additional capital investment by present security holders or outside investors. (R. 6332-44) The recapitalization plans also contemplated no changes in the miscellaneous secured notes held by non-GPCC affiliated persons, the construction notes held by Unionamerica or in the existing preferred stock. The plans described the United Park notes due in 1987 as "the most senior security in [GPCC's] capital structure, having a prior lien on substantially all the resort's properties and facilities," and proposed that these notes would retain their senior, fully secured position. (R. 6335) Salomon stated that it believed the plans were "fair and equitable to all present security holders on the basis of their current position within [GPCC's] capital structure." (R. 6333) There is evidence that certain members of the United Park Board, such as S.N. Cornwall, were not informed of the Salomon recommendations. (R. 4802; 4786-87) Salomon's recommendations were never implemented.

Ex. 51) The Aspen Ski Resort owners notified United Park in April 1975 that Aspen would be interested in purchasing the operations if GPCC could not meet its obligations to United Park and United Park took back the ski area. (R. 6599) United Park's management did not pursue this option. (R. 4750)

Royal Street and Morgan-Fidelity then negotiated with Nick Badami of AMOT, presenting AMOT with a most favorable opportunity: for a modest investment it could acquire a unique and profitable ski operation, together with valuable real estate, including a golf course and other commercial property suitable for hotel sites and condominiums, and one-half of United Park's water rights, all at the favorable 1971 prices. AMOT and Badami knew the increased 1975 values of the land and the ski resort from the GPCC prospectuses. (R. 7946 at 131) Gilbert Butler, Morgan-Fidelity's representative, who favored Vail to acquire GPCC, said that Vail "walked away from the greatest corporate opportunity in their history and Nick Badami was smart enough to pick it up." (R. 7954 at 94) In the negotiations, Badami joined Morgan-Fidelity in insisting on two additional 20-year Ski Lease extensions from United Park. (R. 7921 at 58, 139-40; 7939 at 237)

The 1975 Resort Agreements

In June 1975, AMOT, Morgan-Fidelity, Royal Street, Unionamerica and United Park management entered into a Memorandum of Agreement (R. 6625-57), which divided up the assets of GPCC as follows:

Royal Street. Royal Street was assigned GPCC's rights under the 1971 Land and Water Agreements to purchase from United Park -- at the favorable 1971 prices but with further extended payments -- the Deer Valley properties, other properties near the Park City resort facilities and Thaynes Canyon, and one-half of United Park's water rights. Royal Street valued these properties and water rights at more than $18 million. (R. 6521; 4751-52) The amounts remaining to be paid for these properties and water rights under the 1971 Agreements was approximately $1.9 million. (R. 6638)

In addition, United Park agreed to sell other properties with great potential value as building sites that Royal Street needed to develop the Deer Valley area. These properties had not been included in the original 1971 Land Agreement, and were subsequently sold to Royal Street at prices below their market value and some at prices below United Park's cost. (R. 6374; 4752) Royal Street was also assigned the right to lease for skiing purposes 1,834 acres in an expanded Deer Valley Lease for the same low rentals as in the original 47-acre Deer Valley Lease, with two additional 20-year extensions at nominal rental increases. (R. 5291-97; 6639)

In return, Royal Street cancelled $250,000 in subordinated notes, its shareholder loan to GPCC of $694,420, and a questionable claim for accrued management fees of $366,000. Royal Street also sold the GPCC preferred and common stock which it purchased for about $530,000 to AMOT and Unionamerica for $4,000. Royal Street also agreed to assume a $1.5 million loan which it had previously guaranteed.

Morgan-Fidelity. Through their subsidiaries, GPI and PPI, Morgan-Fidelity became the owners of 210 acres on which the Park City base resort facilities are located and 53 acres of contiguous property, and the lessees of United Park under the Resort Area and Crescent Ridge Leases. These two leases were extended for two additional 20-year terms, from the year 2011 to the year 2051. Morgan-Fidelity then sublet the ski resort property to GPCC for an increasing percentage of GPCC's ski lift revenue between 1975 and 1983. For the remaining 67 years on the lease, Morgan-Fidelity received either 12-3/4% of GPCC's lift revenue for the base year 1983 (increased by a consumer price index factor), or 8-3/4% of GPCC's lift revenue for the current year, whichever was greater. Morgan-Fidelity was responsible for the 1/2 of 1% rental due United Park. As of 1986 Morgan-Fidelity had received $5.5 million in Ski Lease revenues with 65 years remaining on the leases. In the past three years, 1987, 1988, 1989, their revenue percentage has averaged close to $1 million annually. (R. 4768-69)

In return, Morgan-Fidelity cancelled $5.5 million in subordinated notes; its shareholder loan to GPCC of $407,000; and sold for a nominal amount their 20% share of GPCC common stock which cost them $466,000. This unsecured investment, with accrued interest, totalled about $6.8 million. (R. 6635-38)

Unionamerica. Unionamerica received developed and undeveloped GPCC real property with a 1975 value of $14,200,000; trust deeds, notes and contracts with a total balance owing of $695,000, prepaid water connection fees worth $477,000, and condominium furnishings and accessories. (R. 4768; 6651-53) Unionamerica also increased its equity share of GPCC from 5% to 20% and received 15% of the equity in the Morgan-Fidelity subsidiaries and 6% of the equity in Royal Street Land. Shortly after the Memorandum of Agreement was signed, Unionamerica sold its 20% interest in GPCC to AMOT for $325,000 and its 15% equity interest in the Morgan-Fidelity subsidiaries for $317,500. (R. 4765-66) United Park believes that Unionamerica also sold its interest in Royal Street Land to Royal Street's major equity holder, but the district court's ruling has precluded United Park from discovering these facts. In return, Unionamerica cancelled its loans to GPCC totalling $9,223,655, and its notes and shareholder loan to GPCC which totalled $382,547. (R. 6626; 6653)

AMOT. AMOT acquired 80% of the GPCC common stock, by agreeing to infuse $1,300,000 into GPCC to offset remaining book liabilities, and to guarantee GPCC loans, including a First Security Bank loan of $450,000. (R. 6647-48; 5940) For this modest investment, AMOT acquired through GPCC the right to lease the Park City Ski Resort operations from Morgan-Fidelity. Using a discounted cash flow analysis based on the actual 1974 skiing operations financial results, the Park City Ski Resort had a value of $15,600,000 at a 12% discount rate. (R. 4765) AMOT also received certain development properties including the golf course, worth $4.2 million in 1975, GPCC's share of United Park's water rights, worth $1.17 million in 1975, and the benefit of GPCC's tax loss carryforward of $6 million. (R. 4765; 7948 at 395-98)

United Park. United Park relinquished its major equity interest in GPCC, which had been the primary justification for the very favorable terms of the 1971 Agreements, by selling its common and preferred stock in GPCC which had cost $972,000 for $2,000. United Park remained bound under the 1971 Land Agreement, but extended the time for payment by three years. United Park thus conveyed 4200 acres of real property, the ski resort base facilities and the golf course at the favorable 1971 prices -- even though United Park was giving up its major equity interest, the properties had increased greatly in value, and United Park had the right to reclaim the properties pursuant to the cross-default provisions of the 1971 Agreements.[5] United Park also sold to Royal Street additional valuable building site properties that were not included in the 1971 Land Agreement at prices below market value and some even below cost. (R. 4757)

United Park also remained bound under the favorable terms of the 1971 Water Agreement, and extended the time for payment from 11 to 14 years, even though United Park was entitled to terminate the Water Agreement. The 1971 Water Agreement had reserved to United Park only the water needed for "mining, milling and related purposes." (R. 5089) Because in 1971 United Park was to own a major share of GPCC and would benefit from GPCC's property development and sale of water, United Park sold more water to GPCC than GPCC needed to develop all its Park City and Deer Valley properties. (R. 4766) With United Park relinquishing its equity in GPCC, however, there was no longer any reason to sell more water than GPCC and Royal Street actually needed. United Park should have and easily could have retained additional water to develop its

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[5]There is evidence that some of United Park's directors, like S.N. Cornwall, may have agreed to do so based on the representations of GPCC that the land had no value. (R. 6024-25; 4802-03) However, representatives of United Park's controlling shareholders and the other parties to the transaction knew that the land had greatly appreciated in value between 1971 and 1975, and that the undeveloped Deer Valley properties were particularly valuable. See supra at 17-18.

own properties or to sell to others.

United Park also agreed to extend the three Ski Leases for two 20-year terms, or until the year 2051, and to substantially enlarge the acreage of the Deer Valley lease. United Park received nothing for these extensions and enlargement, including no increase in ski lease revenues from 1975 until 2011, and only a nominal 1/2 of 1% increase from 2011 until 2051. As a consequence, GPCC pays United Park approximately $60,000 annually in ski lease revenue, and pays Morgan-Fidelity approximately $1 million.[6] (R. 4763-64) The refusal of Anaconda, ASARCO and United Park management to attempt to retain the additional water in 1975, or to increase the minimal ski lease revenue, in particular manifests their reckless indifference to the interests of United Park and its outside shareholders.

In effect, the 1975 Resort Agreements restructured GPCC solely at the expense of United Park. Royal Street cancelled debts, some very questionable, of no more than $2 million, assumed a $1.5 million loan that it had previously guaranteed, and purchased for $1.9 million the Deer Valley and Park City properties and water rights that it valued at more than $18 million. Morgan-Fidelity cancelled debts of $6.8 million in return for the valuable Park City Resort base facilities and more than $8.5 million in ski lift revenue through 1989 and continuing to the year 2051. Unionamerica cancelled debts of $9.6 million in return for properties worth nearly $16 million; and AMOT purchased GPCC, the golf course, and certain water rights worth more than $20 million in 1975, for less than $2 million. United Park in contrast gave away its equity in GPCC for nothing, extended the three Ski Leases from the year 2011 to the year 2051 for nothing, and sold its property and water rights, valued by defendants at nearly $40 million, for $4 million.

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[6]The unfairness of the Ski Lease terms is further demonstrated by the fact that the Memorandum of Agreement gave GPCC an option to develop the Deer Valley ski resort. If exercised, the option entitled Royal Street to 3.5% of lift revenues, or seven times the percentage paid to United Park. (R. 4751-52; 7940 at 160-62)

The June 23, 1975 Memorandum of Agreement required United Park's shareholders to approve the 1975 Resort Agreements at a special shareholder meeting which eventually was held on October 7, 1975. Many terms of the Agreements, however, were performed well before the scheduled shareholder meeting. Unionamerica received the property deeds and contract rights even before the Agreements were signed, and sold or liquidated some of the property during the summer of 1975. (R. 6626; 4753; 7953 at 97) In late spring 1975, Royal Street surrendered control and management of GPCC to AMOT, which infused $675,000 into GPCC. (R. 7940 at 86; 5940) Anaconda and ASARCO caused United Park to make the undisclosed sale of valuable real property in Deer Valley to Royal Street at prices well below market value. (R. 4753-54) Unionamerica agreed to sell its twenty percent interest in GPCC to AMOT for $325,000 following United Park shareholder approval. (R. 7940 at 105-6)

SUMMARY OF ARGUMENT

The district court ignored the governing precedents of this Court, improperly resolved disputed issues of fact against United Park, entered findings on issues not raised by the motions, and violated "bedrock" principles of law in dismissing certain claims. Specifically, United Park appeals the following fundamental errors:

First, the district court abused its discretion by denying United Park the opportunity to complete relevant discovery.

Second, the district court improperly held that United Park's fiduciary duty claims were time-barred because United Park discovered or should have discovered the claims in 1975 through outside shareholders or independent directors. The court rejected compelling evidence that United Park could not discover or assert its fiduciary duty claims before independent management assumed control of United Park in August 1985. Those facts established that defendants ARCO and ASARCO, United Park's controlling shareholders, and other defendants misrepresented and concealed essential information from United Park's outside shareholders; and that United Park's directors were not independent and would not or could not assert those claims.

Third, the court improperly held that United Park's fiduciary duty claims were barred by the Bangor Punta doctrine, because Loeb purchased approximately 31% of United Park's shares from Anaconda and ASARCO in 1985. The Bangor Punta doctrine precludes a corporation from suing former management for mismanagement and corporate waste where the wrongdoers had sold virtually all of the shares of the corporation to the current shareholders at a price that reflected the wrongdoing. Bangor Punta does not apply to United Park's fiduciary duty claims because Anaconda and ASARCO sold less than one-third of United Park's shares. United Park, not Loeb, is the real party in interest and defendants did not attempt to prove that United Park would receive a windfall. Further, Bangor Punta does not apply to United Park's claims against defendants other than Anaconda and ASARCO. Finally, even if Bangor Punta applies, it requires at most a pro rata reduction for the shares purchased by Loeb, and not a complete bar of United Park's claims. The district court ruling stands Bangor Punta on its head, and grants defendants the windfall the doctrine is intended to avoid.

Fourth, the district court improperly found that "no genuine issues of material fact exist" regarding United Park's breach of fiduciary duty claims against Anaconda and ASARCO. Anaconda and ASARCO unquestionably owed fiduciary duties to United Park as its controlling shareholders, and United Park presented substantial evidence that Anaconda and ASARCO breached those duties. These findings were particularly egregious because Anaconda and ASARCO never moved for summary judgment on the ground that they owed no duties or that they did not breach their duties.

Fifth, the district court improperly dismissed United Park's claims against AMOT and GPCC for aiding and abetting Anaconda's and ASARCO's breaches of fiduciary duty. Aiding and abetting liability is a "bedrock" principle of law and United Park presented to whether defendants breached fiduciary duties to United Park (or aided and abetted the breaches of others), whether United Park could have discovered or asserted its fiduciary duty claims in 1975, and whether GPCC and Royal Street have breached the Resort Agreements. Moreover, the stay of discovery obtained by ARCO and ASARCO precluded United Park's discovery. Under these circumstances, the district court abused its discretion in granting defendants' motions before permitting United Park to complete discovery. Thus, the judgment must be reversed. Cox v. Winters, 678 P.2d 311, 312-15 (Utah 1984); Strand v. Associated Students of Univ. of Utah, 561 P.2d 191, 193-94 (Utah 1977).

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING UNITED PARK'S FIDUCIARY DUTY CLAIMS AS BARRED BY THE STATUTES OF LIMITATION.

United Park's first four causes of action allege breaches of fiduciary duty in connection with the 1975 Resort Agreements. United Park alleges that Anaconda and ASARCO breached their duties of loyalty, fairness and care as controlling shareholders by causing United Park to give away its equity share in GPCC so they could concentrate on mining activities and protect their discrete interest in Park City Ventures. United Park alleges that the other defendants, Royal Street, Morgan-Fidelity, GPCC and AMOT, induced or aided and abetted these breaches by Anaconda and ASARCO, or breached their own fiduciary duties to United Park, by overreaching, making unwarranted threats, and taking unfair advantage of United Park.

The district court held that these claims were time-barred because United Park, in 1975, "knew or should have known of any alleged wrongdoing resulting from" the 1975 Resort Agreements. (R. 7854-55, ¶ 1)[8] The court purported to make "factual findings"

[8]The district court held that United Park's claims against Anaconda and ASARCO are governed by the three-year statute of limitation in Utah Code Ann. § 78-12-27 (1953) (actions against directors or stockholders of a corporation), and that United Park's claims against the other defendants are governed by the four-year statute of limitations in Utah Code Ann. § 78-12-25(3) (1953, as amended) (actions not otherwise provided for by law).

that United Park's shareholders were informed of the terms of the Agreements and were on notice of facts that would put a reasonable person on notice of a cause of action. (R. 7854, ¶ 12) The court also made "factual findings" that United Park's independent directors were fully informed about the Agreements, were free from conflict of interest, and were not otherwise implicated in the wrongdoing. (R. 7852-53, ¶ 4)

In making these factual findings, the court improperly rejected evidence that United Park could not discover and assert its claims before new management assumed control of United Park in August 1985.[9] United Park established that defendants concealed from United Park's outside shareholders information essential to enable them to judge the fairness of the Agreements or discover that defendants had breached their fiduciary duties. Crucial information, including the value of the properties that United Park gave to GPCC and other defendants, was never disclosed to shareholders at the May 27, 1975 annual shareholder meeting (where the Agreements were first discussed), in the September 2, 1975 Proxy Statement distributed to shareholders, or at the October 7, 1975 special meeting (where the Agreements were approved). United Park

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Because United Park's Amended Complaint was filed in June 1988 and United Park alleges that it could not discover and assert its claims before August 1985, the difference in the two statutes is immaterial to the district court's ruling and to the issues on appeal.

[9]A corporation discovers wrongdoing by its officers, directors or controlling shareholders through outside shareholders or independent directors. "Discovery" of fiduciary duty claims thus has two components: the shareholders or directors must have knowledge of the wrongdoing, and must be sufficiently independent and disinterested to be able to assert claims on behalf of the corporation. As long as the wrongdoers remain in control of the corporation and/or conceal their wrongdoing from shareholders or independent directors, the statute of limitations on the corporation's claims against them is tolled. See, e.g., Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873, 876-79 (9th Cir.), cert denied, 469 U.S. 932 (1984); IIT, an Int'l. Inv. Trust v. Cornfeld, 619 F.2d 909, 928-32 (2nd Cir. 1980).

United Park alleges that it could not discover and assert its breach of fiduciary claims until August 1985, both because Anaconda and ASARCO controlled United Park and the other defendants were implicated in the wrongdoing and because they concealed information about their wrongdoing from United Park's outside shareholders.

also presented substantial evidence that United Park's outside directors Romney, Cornwall and Steele, had conflicts of interest or were implicated in the wrongdoing, or that defendants concealed crucial information from them. Finally, the district court ignored United Park's investigation beginning in 1985, which established that defendants continued to conceal information throughout 1985, and that United Park exercised reasonable, if not exceptional, diligence to discover its fiduciary duty claims, both before and after United Park filed its initial complaint in 1986.

The district court's findings are particularly egregious because defendants' motions were so fact-specific and because the issue of discovery is so seldom capable of resolution on summary judgment. Following a discussion of the appropriate legal standard, each of the facts that controverts the district court's findings is presented below.

A. United Park's Claims Did Not Accrue Until United Park Discovered or Should Have Discovered the Facts Constituting the Breaches of Fiduciary Duty, and Defendants Bore An Exceptionally Heavy Burden to Demonstrate No Genuine Issue of Material Fact

As this Court has held again and again in a variety of contexts, an injured party discovers a cause of action when he or she discovers "that there is a wrong to be complained of" or "the facts constituting the cause of action." In Stewart v. K&S Co., 591 P.2d 433, 435 (Utah 1979), this Court held that "where there is a fiduciary relationship, such as between corporate officers and a stockholder, the statute of limitations does not begin to run until the stockholder discovers, or in the exercise of reasonable care should discover, that there is a wrong to be complained of" (emphasis added). In Myers v. McDonald, 635 P.2d 84, 86 (Utah 1981), this Court noted that in "some enumerated areas of the law, our Legislature has adopted the discovery rule by statute so that the limitations period does not begin to run until the discovery of facts forming the basis for the cause of action" (emphasis added). And in Chapman v. Primary Children's Hosp., 784 P.2d 1181, 1184 (Utah 1989), this Court recently held that discovery of fraudulent concealment in the context of the Utah Health Care Malpractice Act, includes the discovery of "legal injury" or "awareness of physical injury and knowledge that the injury may be attributable to negligence."

United Park's fiduciary duty claims therefore did not accrue until United Park discovered or should have discovered the facts constituting the breaches of fiduciary duty. Knowledge of the 1975 Resort Agreements or their terms alone cannot trigger the statute, because it does not constitute knowledge that a wrongdoing has been committed. In Riddell v. Riddell Washington Corp., 866 F.2d 1480 (D.C. Cir. 1989), for example, a closely-held corporation repurchased the shares of one shareholder. Corporate officers told the shareholder that the purchase price had been determined by independent appraisal, when in fact the corporate officers directed the preparation and outcome of the appraisal. The court held that the shareholder's claims for fraud and breach of fiduciary duty against the corporate officers did not accrue when the shareholder suspected the appraisal was too low, but only later when the shareholder discovered the "facts that are central" to his claims -- that the appraisals were not independent. 866 F.2d at 1494-95. In Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873 (9th Cir.) cert denied, 469 U.S. 932 (1984), the Ninth Circuit held that a corporation's financial problems did not give its shareholders knowledge of fraud and malpractice by the corporation's accountants:

> Financial problems, however, do not necessarily suggest accounting fraud. Sudden losses, the "going concern" qualification, a decline in stock price, suspension of trading, difficulty with creditors, and the resignation of top management may also be explained by financial mismanagement, cost overruns, general market conditions, or other events unrelated to accounting fraud.

727 F.2d at 878.

So it is here. The Resort Agreements themselves do not give notice of wrongdoing. It is only when United Park discovered or should have discovered the facts constituting the breaches of fiduciary duty -- the wrongdoing -- that United Park's fiduciary duty claims accrued.[10]

The discovery rule imposes a heavy burden on summary judgment,[11] because "discovery" is so fact specific:

> The question of when the alleged wrongdoing occurred or should have been discovered is a question of fact. It may be decided as a matter of law only when uncontroverted evidence irrefutably demonstrates that the plaintiff discovered or should have discovered the defendant's wrongful conduct.
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> * * *
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> The issue of what a reasonably prudent [person] should have known is one that is particularly suited to a jury determination. Because precedent dictates that the question of actual or constructive notice of a cause of action is for the trier of fact, the party seeking summary judgment has a heavy burden to show that there exists no issue of material fact regarding notice.

Washington v. Baenziger, 673 F.Supp. 1478 (N.D. Cal. 1987) (emphasis added), citing Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d at 877, 879; Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1309-10 (9th Cir. 1982). Whether the injured person had

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[10]See also Bowen v. City of New York, 476 U.S. 467, 480-81 (1986) (although claimants knew that Social Security Administration had denied their claims for benefits, their causes of action did not accrue until they knew that the denial had been made pursuant to an internal and illegal governmental policy); Richards v. Mileski, 662 F.2d 65, 69-70 (D.C. Cir. 1981) (cause of action by federal employee, who had been coerced into resignation of employment under false charges of homosexuality, against employer for knowing and malicious use of false information accrued when employee learned that his employers had participated in the preparation of the false charges, not when he learned that the charges were false or when he resigned).

[11]Summary judgment is proper, of course, only if there is no genuine issue of material fact and the moving party demonstrates that it is entitled to judgment as a matter of law. The facts forming the basis for summary judgment must be clearly established or admitted, and any and all doubts, uncertainty, and inferences must be resolved in favor of the non-moving party. See, e.g., Spor v. Crested Butte Silver Min. Inc., 740 P.2d 1304, 1307-08 (Utah 1987); Geneva Pipe Co. v. S & H Ins. Co., 714 P.2d 648, 649 (Utah 1986).

knowledge sufficient to put him on notice,[12] whether the injured person exercised diligence to discover the claims,[13] and whether material information was concealed or the person was otherwise misled,[14] are all fact questions that render summary judgment seldom appropriate.

For this reason, this Court recently emphasized that even where it "may be a close call" whether a plaintiff discovered or should have discovered its cause of action, "[s]uch close calls are for juries, not judges, to make." Chapman v. Primary Children's Hosp., 784 P.2d at 1186. The facts here, however, do not present a close call. United Park presented compelling facts from which a jury could conclude that United Park could not have discovered its breach of fiduciary duty claims before 1985. The district court improperly resolved those questions of fact against United Park.

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[12]See, e.g., Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1309-10 (9th Cir. 1982) (because the "question of notice of fraud is for the trier of fact, the party seeking summary disposition has an extremely difficult burden to show that there exists no issue of material fact regarding notice").

[13]See, e.g., Robertson v. Seidman & Seidman, 609 F.2d 583, 591 (2d Cir. 1979) (issues of "due diligence and constructive knowledge depend on inferences drawn from the facts of each particular case" and render summary judgment inappropriate when conflicting inferences can be drawn); Azalea Meats, Inc. v. Muscat, 386 F.2d 5, 10 (5th Cir. 1967) ("[i]nevitably the factual issue of due diligence involves, to some extent at least, the state of mind of the person whose conduct is to be measured against this test and it is simply not feasible to resolve such an issue on motion for summary judgment"); First Interstate Bank v. Piper Aircraft Corp., 744 P.2d 1197, 1201 (Colo. 1987) (en banc) (whether "at a fixed moment in time a particular plaintiff should have known the material facts forming the basis of one or more tort claims . . . is not a question . . . of law" and must be deemed a question of fact for determination by the fact finder).

[14]See, e.g., Cavic v. Grand Bahama Dev. Co., 701 F.2d 879, 888 n.6 (11th Cir. 1983) (whether fraud should have been discovered is question of fact, particularly where conduct of fraudulent party was calculated to mislead, deceive, or dissuade inquiry from the victim); Baker v. Beech Aircraft Corp., 114 Cal. Rptr. 171 (Cal. App. 1974) (whether defendant fraudulently concealed fact material to claim for relief and whether plaintiff exercised reasonable diligence in discovering fraud are questions for the jury).

B. United Park Presented Compelling Evidence That Defendants Concealed Material Information And That United Park Could Not Discover Its Fiduciary Duty Claims Until 1985.

1. Defendants Concealed From United Park's Outside Shareholders Information Essential to Discovery of the Claims.

The district court found that United Park's outside shareholders had knowledge of the 1975 Resort Agreements through the discussion at the annual shareholder's meeting on May 27, 1975, through the September 2, 1975 Proxy Statement distributed to shareholders and through the discussion of the Agreements at the October 7, 1975 special meeting. (R. 7826-27, ¶¶ 14-15, 18-19; 7853-54, ¶¶ 6-7, 10-11) The court concluded that United Park's shareholders had knowledge of the transactions and notice of facts that would put a reasonable person on notice that he may have a cause of action. (R. 7836-37, ¶ 2; 7854-55, ¶ 1)

The district court did not specify what facts placed shareholders on "notice" of the breach of fiduciary claims, aside from the terms of the Agreements and the discussion of the Gartner letter at the special meeting (discussed infra at 38-44). Contrary to the implication in the district court's findings of fact, shareholder knowledge of the Agreements alone cannot trigger the statute of limitations because it does not give shareholders knowledge, as this Court requires, that a wrongdoing has been committed. See supra at 30-31.

Also contrary to the district court's findings, the presentation at the May 27, 1975 annual shareholder meeting did not provide shareholders with knowledge of the Agreements. That presentation consisted merely of a statement that the transactions were to be performed. (R. 5929-31) Management did not disclose to the few shareholders in attendance many critical facts, including the greatly enhanced values of the real property interests or water rights; the increasing value and profitability of the Park City Ski Resort operations; the full details of the Morgan-Fidelity leases; any details regarding the Royal Street - GPCC ski lease option; the side agreements with Royal Street for the conveyance of additional United Park land; or Unionamerica's agreement to sell its 20% equity position in GPCC to AMOT for $325,000. Management also misrepresented that Unionamerica would receive only property on which it held mortgages, when in fact, Unionamerica received additional properties. Management represented that Royal Street was to receive "undeveloped properties in the resort area," but failed to disclose that these properties included the very valuable but undeveloped Deer Valley properties (R. 5929).

The September 2, 1975 Proxy Statement continued to conceal information material to the fairness of the Agreements. The district court found that the Proxy Statement "stated in detail what UPCM was giving and what it was receiving," but the short, six-page statement (R. 6662-67), made the following material misrepresentations and omissions:

First, the Proxy Statement failed to disclose the value of United Park's land, ski resort, and water rights and misrepresented that United Park "does not know the current market value of these property interests." (R. 6666) In fact, Clark Wilson, Anaconda's representative on both the United Park and GPCC Board of Directors, knew in the spring of 1975 that "[t]he value of the properties is now much greater than in the [1971] UPC contract, perhaps 10 times." (R. 6467) Moreover, Royal Street and GPCC had substantial information from which an informed opinion on market value could easily have been derived. Royal Street prepared prospectuses for GPCC in late 1974 and early 1975 valuing the property that United Park had contributed to GPCC (excluding the ski resort, golf course, water rights and other assets) at $37.8 million. (R. 6529)

Second, the Proxy Statement failed to disclose the increasing value and profitability of the Park City Ski Resort operations. The Proxy Statement did not disclose, for example, that the resort had earned $1 million in profit during each of the

1973-74 and the 1974-75 ski seasons, or that the operations were worth as much as $15.6 million based on discounted cash flow analysis of the 1974 financials. (R. 6390; 4765)

Third, The Proxy Statement stated the opinion of management that GPCC would be unable to continue business operations if the Resort Agreements were not approved. (R. 6663) This statement was false. Because Unionamerica had already cancelled GPCC's major debt in exchange for property, United Park's management knew or should have known that there was no real risk of bankruptcy, given the value of the real property, water rights and the ski resort. (R. 4756; 4782-84; 4788-89; 4859; 6346)

Fourth, the Proxy Statement failed to provide any comparative analysis of what each of GPCC's stockholders had contributed to GPCC and what each of them was receiving under the 1975 Resort Agreements or any facts which would permit a United Park shareholder to make this critical comparison. (R. 4757)

Fifth, the Proxy Statement failed to disclose that Morgan and Fidelity annually would receive more than 12% of Ski Lease revenues (R. 6636-37), or 24 times the revenues United Park received on its rentals. The Statement also failed to disclose that GPCC received an option from Royal Street to develop skiing at Deer Valley, which if exercised, would have required GPCC to pay Royal Street 3.5% of lift revenues (R. 4751-52; 7940 at 160-62), seven times the percentage that United Park received.

Sixth, the Proxy Statement failed to disclose that Unionamerica would increase its equity in GPCC from 5.5% to 20%, and obtain a 15% interest in GPI and PPI and a 6% interest in Royal Street. (R. 6626-27)

Seventh, the Proxy Statement failed to disclose that United Park had additionally agreed to convey some valuable building site properties in the Deer Valley area, not included in the 1971 Agreements, to Royal Street at cost or below. (R. 4757)

Eighth, the Proxy Statement failed to disclose that AMOT acquired GPCC's tax loss carry forward of approximately $6,000,000, and valuable United Park properties that

AMOT could sell to take full advantage of this tax benefit. (R. 4757; 7948 at 397-8)

Ninth, the Proxy Statement falsely stated that the proposed transaction would have no material effect on United Park's income, assets, and future economic viability, and that the Agreements were in the best interests of United Park. (R. 6663; 6667) In fact, the transaction greatly impaired United Park's financial position by terminating all significant future participation in the expansion and development of the Park City and Deer Valley resort operations, property, and property rights. In short, all material benefits from the surface utilization of United Park's developable properties and water rights, including the operation of a world class ski area, were given away and United Park was left dependent on its underground mining interests then operated by Anaconda and ASARCO. (R. 4757-58)

Finally, the Proxy Statement failed to disclose several conflicts of interest. It failed to disclose the policy of Anaconda and ASARCO to concentrate on mining and to have United Park get out of the resort and land development business, or that this policy conflicted with the interests of United Park's other shareholders. See supra at 15-16. It failed to disclose that the VanCott firm, which had drafted the Proxy Statement, was also representing Royal Street and GPCC. (R. 7932 at 485-90; 7942 at 32-3, 45-7, 99-100, 104) It failed to disclose that Director Harold Steele's bank, First Security, had made a large loan to GPCC which AMOT had agreed to guarantee. (R. 5940)

In short, the September 2, 1975 Proxy Statement concealed information that would have enabled United Park's shareholders to assess the fairness of the Agreements or enabled them to discover that Anaconda and ASARCO and others had breached their fiduciary duties to United Park. Whether documents such as a prospectus give shareholders knowledge of a cause of action

> calls for a review of the documents in question by a trier of fact in light of all the evidence. A trial judge should not assign conclusive legal effect to such documents at the summary-judgment stage when there can be a genuine

> difference of opinion as to their impact on a reasonable person.

Briskin v. Ernst & Ernst, 589 F.2d 1363, 1368 (9th Cir. 1978). In light of the Proxy Statement's material omissions and misrepresentations, the court's finding that the Proxy Statement "stated in detail what UPCM was giving and what it was receiving," is insupportable and improper.

2. The Gartner Letter Is Not Evidence That United Park's Shareholders Had Notice Of The Fiduciary Duty Claims, And In Fact, Presents Compelling Evidence That United Park's Shareholders Could Not Discover United Park's Claims

Shortly before the October 7, 1975 special meeting, a few shareholders sent letters to United Park's Board of Directors in response to the Proxy Statement. In one letter, Jerome Gartner, a New York attorney for shareholder Timothy Donath, complained that, based on his research at the SEC offices in New York, the Agreements appeared unfair and that the Proxy Statement failed to disclose certain material information. (R. 6669-82) Gartner requested that the Board of Directors postpone the special meeting until full and complete disclosure was made to shareholders. The district court devoted significant attention to the Gartner letter, finding that it was reviewed and discussed by United Park's Board of Directors, who voted to proceed with the special meeting, and that the letter was disclosed to shareholders who attended the meeting. (R. 7826-27, ¶¶ 16-18; 7853-54, ¶¶ 8-10)

The district court did not specify whether the Gartner letter was undisputed evidence that United Park's other shareholders had knowledge of the fiduciary duty claims, because it was discussed at the special meeting, or whether the letter was evidence that one shareholder -- Donath -- had knowledge of the claims, which could be attributed to United Park. Either way, the finding cannot stand as undisputed fact, because it gives defendants the benefit of every inference and ignores all the facts and circumstances surrounding the letter. In fact, the letter is strong evidence that defendants concealed and misrepresented material information, because from the moment defendants received Gartner's letter, they tried to convince Gartner and other United Park shareholders that Gartner's assertions were utterly groundless, and to ensure that neither Gartner nor any shareholder challenged the Agreements.

Clark Wilson, one of Anaconda's employees on the United Park Board, immediately sent the Gartner letter to Anaconda and ASARCO lawyers in New York, and asked Anaconda and ASARCO officials whether the meeting should be postponed. (R. 7930 at 142) Anaconda and ASARCO instructed the United Park Board to proceed with the meeting as scheduled. Id. Representatives of Anaconda, ASARCO, and the other parties to the Agreements then met at the VanCott law offices and discussed how to handle Gartner and ensure shareholder approval. (R. 5940) Nick Badami, president of AMOT, agreed to attend the shareholder meeting and was "coached" as to how to persuade the United Park shareholders to approve the Agreements. (R. 7941 at 286)

Wilson and S. N. Cornwall then contacted Gartner by telephone to dissuade Gartner and Donath from opposition. (R. 5940; 4759) Miles Romney, United Park's president, and other management officials sent letters to Gartner and a few other outside shareholders who had written letters raising questions, assuring them that the Resort Agreements, while "very complex and difficult to understand" (R. 7252) were in United Park's best interests and that "[t]he proposed arrangement was arrived at after careful consideration of other alternatives and after exhaustive studies. The proposal is the result of such studies and research . . . ." (R. 6934) These reassuring statements were demonstrably false because, among other things, the United Park Board had not carefully considered alternatives or made any exhaustive studies. In fact, United Park's position had been dictated by the policy of Anaconda and ASARCO to get United Park out of the resort and land development business. See supra at 15-16.

Only eighteen of United Park's more than 5,000 shareholders attended the October 7, 1975 special meeting. (R. 5939; 6962) Miles Romney told those eighteen shareholders that a letter had been received requesting that the meeting be adjourned, and asked S. N. Cornwall to explain the demand. Cornwall then summarized the Gartner letter in the following terms:

> [T]he letter asserts that we did not in our proxy statement sufficiently inform the shareholders as to the nature of the transaction which we propose to approve here today and that the carrying out of this transaction would be detrimental to the interests of this Company . . . . Mr. Gartner, in setting out the reasons why he thought it was detrimental to the interests of the company made a great many statements which are not accurate in all details.

(R. 5940) Cornwall then told the shareholders that GPCC would be in bankruptcy if the Agreements were not approved. Id.

Nick Badami, who had assumed control of GPCC in May 1975, then urged the eighteen shareholders to approve the Agreements. Badami told the shareholders that time was of the essence, that the meeting could not be postponed, and that the Agreements were fair to United Park. (R. 5941-42) Badami characterized the Gartner letter as

> quite a letter, it compares in some cases the operation to Seward's folly in Alaska; however, the man doesn't know that they haven't sold any mineral rights. The letter is a diatribe of misfacts, really. Somebody had not done his homework and these are the kinds of things that always get me a little upset around the country when anybody can wite[sic] a crank letter. I don't know if this is a crank letter, particularly, but it has all the earmarks of being something upsetting, and I don't think it should prevent good business practice.

(R. 5942)

Badami's disparagement of the Gartner letter includes at least one flat misrepresentation of fact -- because the Gartner letter never states that United Park was relinquishing any mineral rights. Badami made these statements to convince the eighteen shareholders that Gartner did not understand the Agreements and that his concerns had no merit. Badami and AMOT knew, however, the substantial values of the United Park properties and ski resort, and knew that the Agreements were unfair to United Park. (R. 6529; 7946 at 131)

Soon after the Special Meeting, Anaconda's Chairman John B. M. Place called Gartner. (R. 4759) United Park can only speculate as to what Place told Gartner, because neither of them has been deposed. Ordinarily, a plaintiff's lawyer in Gartner's position who received a phone call from the corporation chairman would conclude that he had hit the jackpot and file suit. The only reasonable inference -- and an inference to which United Park was fully entitled -- is that defendants somehow induced Gartner to forego opposition.

If the district court intended to find that United Park's shareholders knew about the fiduciary duty claims from the Gartner letter, that finding is clearly wrong. Contrary to the district court's findings (R. 7826-27, ¶ 18; 7854, ¶ 10), defendants did not "disclose" the Gartner letter to United Park's shareholders. Defendants never showed the letter or disclosed its specific allegations to the eighteen shareholders who attended the special meeting. Those shareholders learned only what Cornwall and Badami told them about the letter, that it "made a great many statements which are not accurate," and was a "diatribe of misfacts" and a "crank letter." The vast majority of shareholders who voted by proxy before the meeting (other than Anaconda and ASARCO) never knew about the letter at all. In fact, this Court knows more about the letter than United Park's outside shareholders ever did.

If the district court intended to find that United Park's shareholders had the same knowledge and the same duty of inquiry as Gartner, that finding is clearly wrong. Gartner was an experienced New York City lawyer who had litigated numerous plaintiff's securities lawsuits. Gartner's letter begins:

> The hurried presentation of this demand at this late date stems directly from the misleading and confusing

> impression of the facts obtained from reading your proxy statement for the October 7, 1975 meeting of shareholders. Only intensive research and review of the incomplete set of documents available for inspection in the New York Stock Exchange and Securities and Exchange record room at Federal Plaza, New York, made possible the facts and analysis outlined below, to aid you to make the correct determination, before it is too late, to preserve the rights of the UPK stockholders to the valuable property being abandoned in the proposed agreement set forth in your October 7 proxy statement.

(R. 6670) (emphasis added).

After reviewing the Proxy Statement, Gartner, who knew that the New York Stock Exchange and the SEC maintain corporate records, took the first subway to Foley Square for hours of "intensive research." As a matter of law and fact, United Park's shareholders are not held to the same standard of knowledge and inquiry as a plaintiff's securities lawyer. They have no duty to review corporate books and records, much less the records of United Park, Anaconda and ASARCO on file at the SEC or the New York Stock Exchange. Nor do they have any duty to file a lawsuit to obtain concealed facts, Baskin v. Hawley, 807 F.2d 1120, 1131 (2d Cir. 1986), or to proceed from the outset as if they were "dealing with thieves," Richards v. Mileski, 662 F.2d 65, 71 (D.C. Cir. 1981). United Park's shareholders were entitled to rely on the representations of defendants who, as fiduciaries, had an affirmative duty to disclose all material information. See, e.g., deHaas v. Empire State Petroleum Co., 435 F.2d 1223, 1227 (10th Cir. 1970) (stockholder reliance on corporate fiduciaries is to be expected, and where questions and doubts arise concerning corporate actions, it is reasonable for a stockholder to rely on the knowledge and integrity of corporate managers, although such reliance is not absolute). Defendants' failure to disclose lessens and may absolve United Park's shareholders of any duty to inquire, but again, that is a question of fact for the jury.[15]

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[15]See, e.g., Azalea Meats, Inc. v. Muscat, 386 F.2d 5, 9 (5th Cir. 1967); ("in the event that a fiduciary relationship was present, the standard of reasonableness or evidence of fraudulent concealment against which the plaintiff's diligence is measured is lessened"); Currie v. Cayman Resources Corp., 595 F.Supp. 1364, 1375 (N.D. Ga. 1984)

Finally, if the district court intended to find that one shareholder -- Donath through Gartner -- had knowledge of United Park's fiduciary duty claims, that finding is clearly wrong. Even if Gartner was on inquiry notice, Gartner acted on the inquiry. Defendants did not postpone the meeting or revise the Proxy Statement, as Gartner requested. They presumably did not tell Gartner -- as their fiduciary duties required, but contrary to the Proxy Statement -- that they believed that United Park's real property had increased in value ten times since 1971 and might be worth $37.8 million. And they certainly did not tell Gartner that, as he suggested, they did have a basis for valuing the properties, or that any of his other allegations might have any foundation. Instead, Anaconda and ASARCO kept their proxies in place and directed their employees on the United Park Board to proceed as scheduled. Defendants continued to conceal information and misrepresent the unfairness of the Agreements. They told Gartner by telephone and by letter before the meeting that he was mistaken, that the Agreements were fair to United Park, and that he should take no action. The chairman of Anaconda called Gartner again after the meeting, presumably to reassure him or dissuade him from taking further action.

Thus, the Gartner letter did not give United Park's shareholders knowledge of the fiduciary duty claims. But even if it might have, defendants' false and misleading responses to Gartner and other shareholders absolved Gartner's client or any other shareholder of any duty to inquire further. As this Court has held, "[o]ne cannot justly or equitably lull an adversary into a false sense of security thereby subjecting his claim

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(same holding as Azalea Meets); FSLIC v. Williams, 599 F.Supp. 1184, 1194-95 (D. Md. 1984) (cause of action against former officers and directors of a corporation does not accrue until it is known or can be discovered by a nonculpable person with authority to bring the action; failure to use diligence may be excused where fiduciary duty exists between defendant and corporation); Lucas v. Abbott, 601 P.2d 1376, 1379 (Colo. 1979) (en banc) ("[j]ustified reliance on representations made within the ambit of such a fiduciary relationship lessens the duty of reasonable inquiry").

to the bar of limitations, and then be heard to plead that very delay as a defense to the action when brought." Rice v. Granite School District, 456 P.2d 159, 163 (Utah 1969).[16]

3. United Park's Directors Were Not Independent, Were Implicated In The Wrongdoing, Or Were Uninformed of Information Essential to United Park's Claims.

The district court also made findings that United Park's three "independent" directors had "full knowledge concerning the terms of the restructuring and its effect" on United Park, were not "implicated in any alleged wrongdoing, did not have any conflict of interest and were fully informed of all the material facts." (R. 7825, ¶¶ 11-12; 7852-3, ¶ 3-4) These findings ignore substantial evidence that United Park's directors had conflicts of interest, were misinformed or uninformed about essential information, were implicated in the wrongdoing, or otherwise could not discover or assert claims on behalf of United Park.

From prior to 1971 through 1982, United Park's seven-man board of directors was dominated and controlled by Anaconda and ASARCO, each of whom placed two employees on United Park's Board. In 1975, United Park's so-called "independent" directors were S. N. Cornwall, a retired partner of the VanCott firm ("VanCott"), Miles Romney, a retired mining consultant, and Harold Steele, president of First Security Bank.

Each of these "independent" directors had prior or existing business relationships with Anaconda and ASARCO. Miles Romney, a mining consultant and former director of

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[16]See, e.g., United Indus. Syndicate, Inc. v. Western Auto Supply Co., 686 F.2d 1312, 1318 (8th Cir. 1982) ("inquiry notice" does not defeat a fraud claim where affirmative representations have led the defrauded party to forego inquiry which it might otherwise have made) (Missouri law); Ballew v. A. H. Robins Co., 688 F.2d 1325, 1328 (11th Cir. 1982) (reversing summary judgment where evidence was "equally susceptible of showing" that patient did not know Dalkon Shield caused her injuries and that "any suspicion she had was quashed when in the exercise of reasonable diligence she asked her physicians about a possible connection and they responded equivocally"); Augusta Bank & Trust v. Broomfield, 643 P.2d 100, 108 (Kan. 1982) (action timely filed where plaintiff's suspicions aroused but plaintiff was lulled into confidence by certain representations and abandoned further investigations until after limitations expired).

the Utah Mining Association, had longstanding business relationships with Anaconda and ASARCO. For many years Cornwall's law firm, VanCott, served as counsel for Anaconda as well as United Park. Cornwall remained on United Park's Board following his retirement from VanCott in 1969, and other VanCott attorneys continued to represent Anaconda and United Park. During the restructuring of GPCC in 1975, VanCott acted as counsel for United Park, Royal Street, GPCC and Anaconda. (R. 7932 at 485-90; 7942 at 32-3, 45-7, 99-100, 104) These conflicts were not disclosed in the September 2, 1975 Proxy Statement, which VanCott prepared. These conflicts precluded Cornwall from asserting a claim on behalf of United Park, even if he knew about it. Cornwall, however, told David Bernolfo and Louis Callister that he had been told by GPCC officials in 1975 that the United Park properties had no value, directly contrary to the knowledge of the principals of Anaconda and ASARCO. (R. 4803; 4786-87)

Director Harold Steele was president of First Security Bank, which had a longstanding banking relationship with both Anaconda and ASARCO. Under the 1975 Resort Agreements, AMOT guaranteed a loan from First Security Bank to GPCC. (R. 5940) This material conflict was not disclosed in the Proxy Statement. Steele may never have known the contents of the Proxy Statement or the Gartner letter, because he did not attend either the meeting approving the Proxy Statement or the special shareholder meeting. (R. 5934; 5936; 5939)

Contrary to the district court's finding, Cornwall and Romney were implicated in the wrongdoing. They approved the false and misleading Proxy Statement (R. 5934; 5936), and faced potential liability for its misrepresentations and omissions. Romney and Cornwall took active roles in assuring shareholder approval before and during the special meeting. Romney directed the shareholder meeting to proceed, following instructions from Anaconda and ASARCO, and sent letters to Gartner and other shareholders to dissuade them from opposition. Cornwall also actively dissuaded Gartner, and disparaged the letter at the meeting. <u>See</u> <u>supra</u> at 39-40.

United Park does not know whether these "independent" directors participated in the wrongdoing knowingly or recklessly, or because defendants concealed material information (such as property values) from them. They may have been precluded from asserting fiduciary duty claims on behalf of United Park because they had serious, material conflicts of interest, or because they were implicated in the breaches themselves. Or they may have been unable to discover the breaches because defendants concealed material information from them. The district court's ruling has prevented United Park from ascertaining the facts through discovery. On defendants' summary judgment motions, United Park was entitled to all reasonable inferences, and the district court's findings improperly resolved those facts and those inferences against United Park.

4. United Park Could Not Discover Its Fiduciary Claims Until 1985.

The district court's factual findings also ignored the investigation by independent management beginning in 1985 that led eventually to the discovery and the assertion of the fiduciary duty claims. United Park established that independent management exercised exceptional diligence and could not discover the fiduciary duty claims before United Park filed its initial Complaint in 1986, because defendants continued to conceal information and deflect inquiries through 1986, and because information essential to discovery could not be found in United Park's files.

The Resort Agreements were approved in October 1975. The United Park Board thereafter did not review or analyze the fairness or propriety of the Agreements. (R. 5948-6235) United Park's Annual Reports to Shareholders for the year 1975 through the year 1984 summarized the Agreements in general terms, but did not inform shareholders of the values of United Park's properties or water rights as of the time of the Agreements, the terms of the Morgan-Fidelity Ski Lease payments or the conflicts of interest of Anaconda, ASARCO, S. N. Cornwall, Harold Steele, or the VanCott firm. (R. 5506-5832)

In August 1985, David Bernolfo, representing the Bambergers -- United Park shareholders since 1953 -- became president of United Park. (R. 4736; 4776) At that time, certain problems with the performance by GPCC and Royal Street under the Resort Agreements led Bernolfo to review documents in United Park's files relating to these problems. Bernolfo's review raised questions regarding the Agreements. Answers to those questions, including what properties United Park had given away and the values of those properties, could not be found in United Park's records. (R. 4778-79) Bernolfo directed United Park employees to review title to more than 1,500 parcels. Ultimately, management was able to determine which properties had been transferred to Royal Street, Unionamerica, and others, and which had been retained by GPCC. United Park tried to assign values to these properties, but there were no applicable appraisals or other valuation information in the files. (R. 4779-80)

During the fall of 1985, Bernolfo met with Clark L. Wilson, one of Anaconda's employees on the United Park Board in 1975. Wilson refused to answer any questions about the 1975 Resort Agreements and told Bernolfo that he would instruct the others who were involved not to discuss the Agreements. (R. 4781)

Bernolfo then spoke with Mel Armstrong, a Park City property owner, who, in 1971, had sold some tracts of land in Park City to GPCC on contract. Armstrong said that GPCC never defaulted or threatened bankruptcy. (R. 4782) In January 1986, Bernolfo first spoke with Ken Oswald, a GPCC property salesman in 1975, who said that he knew the values of the real property in 1975, and that GPCC employees considered the threat of GPCC's bankruptcy in 1975 "a joke." (R. 4783) Several weeks later, Oswald provided Bernolfo with a copy of a three inch thick master plan prepared for

Royal Street around 1971. This plan showed that in 1971 Royal Street had a master plan for developing the entire Park City area, including Deer Valley, and that Royal Street considered the Deer Valley properties to be the most valuable properties in the area. Id.

At Oswald's suggestion, Bernolfo spoke with Hal Taylor, then mayor of Park City, who had been a real estate broker for GPCC in 1975. Taylor told Bernolfo that he was able to sell GPCC condominiums as fast as they were built, but GPCC construction problems often delayed delivery. Taylor said that there were a number of buyers interested in GPCC's undeveloped properties but that GPCC would not sell any of them. Taylor also said that no informed GPCC employee believed the rumors in 1975 of a GPCC bankruptcy because of its valuable properties and profitable ski resort. (R. 4783-84; 4858-59)

Bernolfo requested information from Nick Badami of GPCC and Edgar Stern of Royal Street about the Agreements, but they would provide no information. At a meeting in February 1986, however, Badami told Bernolfo he had never understood why United Park had entered into the Agreements and that he had advised United Park not to enter the transaction as far as Morgan-Fidelity was concerned. (R. 4784-85) This comment by Badami was clearly inconsistent with Mr. Badami's statements to the United Park stockholders at the 1975 Special Meeting. (R. 5941-42) See also supra at 40-41.

In March 1986, Bernolfo met with Scott Woodland of VanCott. Mr. Woodland refused to discuss the Agreements, and told Bernolfo to let the matter rest. He refused to provide United Park documents in VanCott's files, even though he and VanCott had represented United Park for many years. United Park eventually obtained these documents by subpoena. Mr. Woodland told Bernolfo he had not represented United Park since 1971 and that he was not involved in any of the Resort Agreements. Woodland's statement is contradicted by United Park files which indicated that Woodland had received a retainer and represented United Park throughout and long after 1975 and that the VanCott firm, with Woodland's assistance, had prepared the 1975 Proxy Statement. (R. 7932 at 485-88; 7942 at 99-100)

In early April 1986, Bernolfo met with Robert Wells, a Royal Street employee who served as GPCC's chief financial officer from 1971 until June 1975 when AMOT took over GPCC. Wells told Bernolfo about the 1974 Salomon restructuring proposals, which had recognized United Park's status as GPCC's senior secured creditor and protected United Park's interests in GPCC. (R. 4785-86)

Bernolfo also met with S. N. Cornwall in April and July 1986. Cornwall said that he had been told by GPCC officials in 1975 that the United Park properties had no value. Cornwall said that he not only thought that the land was worthless in 1975 but also that the ski resort was losing money, and that the United Park Board members were told that if United Park did not agree to the Agreements, GPCC was facing bankruptcy. (R. 4786-87; 4802-03, ¶¶ 5-6)

Based on the information provided by Messrs. Taylor, Cornwall, Armstrong, Oswald, and others, and the refusal of Messrs. Badami, Stern, Wilson and Woodland to provide information, United Park concluded that GPCC and Royal Street had concealed vital information from Anaconda and ASARCO, United Park's minority shareholders, and United Park's Board of Directors. Accordingly, United Park's initial complaint, filed in May 1986, alleged fraud and other legal violations against those defendants, but did not name Anaconda, ASARCO or Morgan-Fidelity as defendants. (R. 2-85)

Limited discovery began in the summer of 1986 and continued intermittently through 1987. Through document production and deposition testimony, United Park learned crucial information that it had been unable to obtain beforehand, particularly with respect to 1975 values of United Park's land and the comparative values received by the parties to the Agreements. (R. 4790-91) United Park also learned through discovery and its further investigation that its controlling shareholders, Anaconda and

ASARCO, knew the property values as well. (R. 4791) Despite their knowledge of the property values, Anaconda and ASARCO decided in late 1974 to get United Park out of the resort and land development business and to concentrate on their joint venture and protect its ability to mine United Park's mining properties.

* * *

In summary, United Park presented compelling evidence from which a jury reasonably could conclude that United Park could not discover the fiduciary duty claims before 1985. Anaconda and ASARCO controlled United Park in 1975. Clark Wilson, Anaconda's representative on United Park's Board admitted in deposition that Anaconda and ASARCO had determined to "get out of the resort business" and protect the Park City Ventures mining lease. Concerned that a threatened bankruptcy of GPCC would impair their ability to mine United Park's property, Anaconda and ASARCO directed United Park to take no action that would interfere with the lease, but to give up its major equity interest in GPCC and the Park City Ski Resort. Anaconda and ASARCO breached their duty as controlling shareholders to obtain a restructuring of GPCC fair to United Park and its outside shareholders. To maximize the evident windfall at the expense of United Park, the other defendants threatened to force GPCC into bankruptcy if all of their demands were not met, and otherwise induced or aided and abetted Anaconda's and ASARCO's breaches of fiduciary duties, or breached their own fiduciary duties to United Park.

To ensure that United Park's shareholders approved the 1975 Resort Agreements, defendants concealed information showing that the Agreements were unfair. Defendants told shareholders they did not know the value of the properties United Park had contributed to GPCC, when in fact they had estimated the residual values of the real estate, excluding the resort and golf course, at nearly $37.8 million. They failed to tell shareholders what other parties received from the Agreements or that United Park was conveying additional properties with substantial value. They failed to disclose the continuing growth and profitability of GPCC's skiing operations. Defendants falsely told shareholders that time was of the essence and that bankruptcy was imminent if the Agreements were not approved. When certain shareholders questioned the fairness of the Agreements, defendants reassured them with misleading statements and disparaged their concerns to a few other shareholders without disclosing the concerns themselves. United Park's "independent" directors had conflicts of interest which precluded them from asserting claims on behalf of United Park, or were themselves ignorant of essential information because defendants concealed it from them.

Before independent management assumed control in 1985, therefore, neither United Park's shareholders nor its "independent directors" could discover or assert United Park's fiduciary duty claims. Those claims could be asserted only after independent management performed a thorough review of United Park's files, met with the principals, many of whom refused to provide meaningful information, and met with many other persons. Not until United Park conducted discovery on its initial complaint in 1986 and 1987, could United Park discover that its former controlling shareholders had breached their fiduciary duties by causing United Park to enter into unconscionable Agreements to protect their own narrow and conflicting interests. The evidence that United Park presented to the district court is not even a "close call," and the district court committed plain error in resolving these disputed fact issues against United Park on summary judgment.

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING UNITED PARK'S FIDUCIARY DUTY CLAIMS AS BARRED BY BANGOR PUNTA.

The district court improperly held that United Park's fiduciary duty claims are "precluded by the doctrine enunciated in" Bangor Punta Operations, Inc. v. Bangor & Aroostock R.R. Co., 417 U.S. 703 (1974). (R. 7855, ¶ 4) The court held that because "Loeb Investments purchased all of the stock of ARCO and ASARCO" in United Park in 1985 (R. 7854, ¶ 13), it "would be inequitable and constitute a windfall for Loeb Investments or the Bamberger Group, which together now control UPCM, to receive any benefit resulting from suit against ARCO and ASARCO from whom the control stock was purchased." (R. 7855, ¶ 3)

The district court rulings stand Bangor Punta on its head, because the district court has enabled defendants to enjoy the windfall that Bangor Punta is intended to prevent. First, Bangor Punta bars claims by a corporation only where the current shareholders have purchased all or virtually all of the corporation's shares from the wrongdoers. Bangor Punta does not bar claims where, as here, the corporation is the real party in interest and asserts claims on behalf of itself and other shareholders damaged by the wrongdoing. Second, Bangor Punta applies only upon an established finding that the current shareholder would recover a "windfall" through recovery. Defendants failed to present any facts, much less establish as a matter of law, that Loeb or the Bambergers would receive an improper windfall by recovery from the wrongdoers. Third, even if Bangor Punta applies, it requires no more than a pro rata reduction in United Park's right to recover from Anaconda and ASARCO equal to the percentage of shares purchased by Loeb. Finally, Bangor Punta does not bar United Park's claims against non-selling third parties.

A. Bangor Punta Does Not Bar United Park's Claims Because Anaconda and ASARCO Held and Sold Less Than One-Third of United Park's Shares.

Bangor Punta barred a corporation from suing its former controlling shareholders for mismanagement and other wrongs because the former shareholder had sold virtually all the corporation's shares -- more than 98 percent -- to the current shareholder. Because the former shareholder had owned all the shares, the corporation in effect sought recovery for wrongs the former shareholder "did to itself." Because the current shareholder paid a price that reflected the wrongdoing, the current shareholder suffered no injury. And because the current shareholder owned all the shares, it was the real party in interest. The Court therefore disregarded the "corporate form" and held that "where equity would preclude the shareholders from maintaining an action in their own right, the corporation would also be precluded." 417 U.S. at 711-13.

Bangor Punta does not bar a corporation from recovery for wrongdoing by former shareholders simply because those shareholders have sold their shares. Indeed, the case upon which Bangor Punta relies, Home Fire Insurance Co. v. Barber, 93 N.W. 1024 (Neb. 1903),[17] states precisely the opposite. Dean (then Commissioner) Roscoe Pound barred a corporation from recovery because all current shareholders purchased their shares from the wrongdoers. Dean Pound explicitly stated that the corporation would not be barred if any of the current shareholders were shareholders at the time of the wrongdoing and therefore are

> entitled to complain of the acts of the defendant and of his past mismanagement of the company; for, if any of them are so entitled, there can be no doubt of the right and duty of the corporation to maintain this suit. It would be maintainable in such a case, even though the wrongdoers continued to be stockholders and would share in the proceeds.

93 N.W. at 1028 (emphasis added).

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[17]A copy of the Home Fire Insurance decision appears in the Addendum to this Brief.

As the court noted in National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 498 F.Supp. 991 (E.D. Pa. 1980), Bangor Punta announces a "narrow doctrine," 498 F.Supp at 1005, whose principles are not "readily transferable beyond the factual circumstances in which they were employed." Id., at 1002. It "does not follow" that "recovery must be denied whenever a corporation seeks to recover for injury suffered before new owners acquired its shares." Id. Significantly, there could have been no lawsuit in either Bangor Punta or Home Fire Insurance until the wrongdoers sold their shares:

> [t]he former owners . . . had nothing to sell except a corporation wasted by their acts of mismanagement. An action brought by [the corporation] before the sale would have been an action against itself, for the injury suffered by [the corporation] was coextensive with the injury suffered by the wrongdoers. In such circumstances it makes no sense to adhere to the corporate fiction, for as a practical matter the corporation has not suffered any cognizable injury.

Id., at 1003. See also In re Pittsburgh & Lake Erie R.R. Co. Securities and Antitrust Litigation, 387 F.Supp. 906, 911 (E.D. Pa. 1974) (corporation is entitled to recovery if "there are minority stockholders who were such at the time of the alleged wrongful transactions;" the "net result of the Bangor Punta case" is that "no recovery can be had by a plaintiff corporation where the beneficiary of a recovery would be a corporation which had purchased 99% of the stock of the plaintiff corporation after the alleged wrongful transactions") (emphasis in original).[18]

Anaconda and ASARCO sold less than one-third of United Park's shares to one shareholder, Loeb. (R. 4736-37) Unlike the current shareholders in Bangor Punta and Home Fire Insurance, Loeb is not the real party in interest, and its purchase of one-third

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[18]Virtually all of the cases applying Bangor Punta to bar a corporation from recovery involve transfers of 99% or more of the stock. See, e.g., Noland v. Barton, 741 F.2d 315, 316 (10th Cir. 1984); In re Rea Express, Inc., Private Treble Damage Antitrust Litigation, 412 F. Supp. 1239, 1250 n.27 (E.D. Pa. 1976); Ford Tank Maintenance Co. v. Ford, 203 N.Y.S. 2d 542, 543 (1960).

of United Park's shares does not justify disregarding the corporate form.[19] Unlike the wrongdoers in Bangor Punta and Home Fire Insurance, Anaconda and ASARCO injured the shareholders who owned the other sixty-eight percent of United Park's shares. Unlike the corporations in Bangor Punta and Home Fire Insurance, United Park's cause of action existed before Anaconda and ASARCO sold their shares to Loeb, if United Park had been able to discover and assert it. Indeed, defendants' statute of limitations motions asserted that United Park's shareholders, including the Bambergers should have discovered the wrongdoing in 1975. Because the Bambergers and other United Park shareholders were injured by Anaconda and ASARCO's wrongdoing, Bangor Punta does not bar United Park's fiduciary duty claims.

B. Defendants Have Made No Showing That Loeb or the Bambergers Would Receive A Windfall From Recovery By United Park.

Bangor Punta also rested on an established factual finding that the current shareholder received full value for its purchase price; i.e., it in effect paid a discounted price for the stock because of the wrongdoing of the defendants. See 417 U.S. at 707-08. Defendants clearly bear the burden on summary judgment to establish a windfall as undisputed fact. See, e.g., El Dorado Bancshares, Inc. v. Martin, 701 F.Supp. 1515, 1520-21 (D. Kan. 1988) (denying summary judgment where evidence of a windfall was in conflict); National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 498 F.Supp. at 1007-

[19] As a general matter, the corporate form may be disregarded only where the shareholder owns all or virtually all the shares. Disregard of the corporation form requires "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and circumstances must indicate that the adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." Laborers' Pension Fund v. Litgen Concrete Cutting & Coring Co., 709 F.Supp. 140, 143 (N.D. Ill. 1989), quoting Fletcher, 1 Cyclopedia of the Law of Private Corporations § 41.30 (Rev. Ed. 1983). Since "it is the exceptional instance where a court will disregard the corporation form, the party who wishes the court to disregard that form bears the burden of proving that there are substantial reasons for doing so." Id., quoting Contractors, Laborers, Teamsters & Engineers v. Hroch, 757 F.2d 184, 190 (8th Cir. 1985).

09 (denying summary judgment because there was material issue of fact whether wrongdoing was reflected in price of shares).

Defendants made no attempt to prove that Loeb paid a discounted price for its shares or would receive a windfall from recovery by United Park. The only facts in the record indicate that the price paid by Loeb did not reflect Anaconda's and ASARCO's wrongdoing. In 1975 United Park stock sold at or substantially below the $2.37 average price per share Loeb paid for its stock. (R. 4737) The record demonstrates that it is unlikely that United Park will pay any dividend in the foreseeable future whether or not it recovers from Anaconda and ASARCO. (R. 4737) Thus, there is no evidence to support the district court's speculation that Loeb would receive a windfall.

Further, there can be no conceivable evidence that the Bambergers would receive a windfall. Again, the Bambergers have been shareholders in United Park since 1953, and they purchased no shares from Anaconda or ASARCO. As outside shareholders, the Bambergers suffered injury from the wrongdoing of Anaconda and ASARCO, and are entitled to recovery under Bangor Punta and Home Fire Insurance. The court's finding that the Bambergers would enjoy a "windfall" is a non-sequitur with no basis in law or fact.

C. At Most, Bangor Punta Requires Only a 31% Reduction in United Park's Recovery From Anaconda and ASARCO.

Assuming arguendo that Bangor Punta precludes Loeb from benefitting from a recovery against Anaconda and ASARCO, United Park is entitled to pro rata recovery on behalf of its other stockholders. Bangor Punta did not address the propriety of pro rata recovery because the plaintiff specifically disavowed any intention to seek it. See 417 U.S. at 718, n. 15. Subsequent cases, however, allow pro rata recovery for the benefit of stockholders who did not purchase stock from the wrongdoers. See, Jannes v. Microwave Communications, Inc., 385 F.Supp. 759, 760 (N.D. Ill. 1974) (permitting corporation pro rata recovery for the less than 10% of the stockholders who did not buy from the wrongdoers); Advanced Bus. Communications, Inc. v. Myers, 695 S.W. 2d 601, 606-07 (Tex. App. 1985). Pro rata recovery is clearly appropriate here, where more than two-thirds of United Park stockholders did not buy from Anaconda or ASARCO. Anaconda acknowledged the principle of pro rata recovery before the district court, but argued that the Bambergers, as well as Loeb, should be precluded. For the reasons stated above, the district court committed clear error when it barred the Bambergers from recovery. (R. 7855, ¶ 3)

D. Bangor Punta Does Not Bar Claims Against Non-Sellers.

Anaconda and ASARCO are the only defendants who sold shares in United Park. The windfall that Bangor Punta seeks to avoid can occur only where a new purchaser, having recovered for the wrongs alleged through a discounted purchase price, seeks to recover again from the seller through litigation. Thus, Bangor Punta applies only to claims against the sellers and not to claims of wrongdoing against third parties. It certainly does not allow third-parties the windfall of avoiding liability for their wrongdoing simply because the corporation's shares have been sold. See FMC Corp. v. Boesky, 673 F. Supp. 242, 247 (N.D. Ill. 1987), rev'd on other grounds, 852 F.2d 981 (7th Cir. 1988) (where corporation "seeks to recover from a third party for wrongdoing done to it . . . none of the equitable principles which informed the Bangor Punta decision have any relevance"); National Union Elec. Corp. v. Matsushita Elec. Ind. Co., 498 F.Supp. 991 (E.D. Pa. 1980); see also Lewis v. Anderson, 477 A.2d 1040, 1050 & n.20 (Del. 1984). The district court committed clear error when it concluded that Bangor Punta barred United Park's Third and Fourth Claims against Royal Street, Morgan-Fidelity, AMOT and GPCC. (R. 7855)

IV. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING UNITED PARK'S FIDUCIARY DUTY CLAIMS AGAINST ANACONDA AND ASARCO.

Anaconda and ASARCO did not seek summary judgment on the ground that they owed no fiduciary duties to United Park or its other shareholders, and did not assert that there were no genuine issues of material fact as to whether they breached these duties. Nonetheless, the district court entered a conclusion of law, drafted by counsel for Anaconda and ASARCO, which purported to resolve these issues even though they were not raised on summary judgment:

> [n]o genuine issues of material fact exist regarding [United Park's] allegations against ARCO and ASARCO. Therefore, Defendant [sic] is entitled to Summary Judgment as a matter of law dismissing all claims for relief contained in [United Park's] Complaint.

(R. 7855, ¶ 5) This bald, unsupported conclusion was clear error. United Park's Amended Complaint stated claims for breach of fiduciary duty and presented substantial evidence that Anaconda and ASARCO breached those duties.

United Park alleges that Anaconda and ASARCO controlled United Park and caused United Park to give away its equity interest in GPCC, including the Park City Ski Resort, its real property and water rights, to protect the Park City Ventures mining lease. This allegation states a claim for breach of fiduciary duty under Delaware law,[20] and elsewhere. Controlling shareholders who affirmatively dictate the direction of a corporation are fiduciaries who owe the duties of loyalty, fairness and care to the corporation and its other shareholders. See, e.g., Ivanhoe Partners v. Newmont Mining Corp. 535 A.2d 1334 (Del. 1987); Singer v. Magnavox, 380 A.2d 969, 976 (Del. 1977).

[20]United Park is a Delaware corporation. Claims involving the internal affairs of corporation, including fiduciary duty claims, are governed by the laws of the state of incorporation. See, e.g., Davis & Cox v. Summa Corp., 751 F.2d 1507, 1527 (9th Cir. 1985); Wilshire Oil Co. v. Riffe, 409 F.2d 1277, 1283, & n.16 (10th Cir. 1969); Restatement (Second) of Conflict of Laws §§ 302, 309 (1971).

Controlling shareholders are liable to the corporation if they breach those duties through self-dealing, through gross negligence or through a failure to disclose material facts. See, e.g., TWA v. Summa Corp., 374 A.2d 5, 10 (Del. Ch. 1977); In re Reading Co., 551 F.Supp. 1205, 1215 (E.D. Pa. 1982) (applying Delaware law).

United Park presented substantial evidence that Anaconda and ASARCO controlled United Park and breached their fiduciary duties, including the admissions of Clark Wilson, Anaconda's representative on the United Park Board. Wilson admitted that Anaconda and ASARCO controlled United Park in 1975, that United Park's position in connection with the restructuring of GPCC was cleared with Anaconda and ASARCO management in New York and dictated by their policy to get out of the resort business, and that Wilson's first duty was to make sure that United Park did nothing to interfere with the mining lease. See supra at 15-16.

These facts were more than sufficient to defeat summary judgment even if Anaconda and ASARCO had made the motion.

V. THE DISTRICT COURT ERRED IN DISMISSING UNITED PARK'S CLAIMS AGAINST AMOT AND GPCC FOR AIDING AND ABETTING THE BREACHES OF FIDUCIARY DUTIES BY ANACONDA, ASARCO, MORGAN-FIDELITY AND ROYAL STREET.

Pursuant to Utah R. Civ. P. 12(b)(6), the district court held, as a matter of law, that United Park failed to state claims for relief against AMOT and GPCC for aiding and abetting breaches of fiduciary duty by Anaconda, ASARCO, Royal Street and Morgan-Fidelity. (R. 7836-37, ¶¶ 2-3) The district court also purported to make findings of fact that AMOT and GPCC did not aid and abet any breaches of fiduciary duty. (R. 7827-29, ¶¶ 21-34) The district court clearly misapplied the standard governing dismissal under

Rule 12(b)(6),[21] and improperly resolved disputed issues of fact under Rule 56.

It is beyond serious dispute that one who aids and abets a breach of duty by a fiduciary is liable to the one to whom the duty is owed. See, e.g., Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1284 n.33 (Del. 1989) ("it is bedrock law that the conduct of one who knowingly joins with a fiduciary, including corporate officials, in breaching a fiduciary obligation, is equally culpable"); Lynch v. McDonald, 367 P.2d 464 (Utah 1962) ("it has frequently been held that one who knowingly aids and abets a fiduciary to make secret profits may be held liable jointly with the fiduciary for such secret profits"); Restatement (Second) of Torts § 876 (1979). United Park alleges that Anaconda and ASARCO breached their fiduciary duties they owed to United Park as its controlling shareholders, and that Royal Street and Morgan-Fidelity breached their fiduciary duties to United Park as co-shareholders in GPCC.[22] United Park also alleges that GPCC and AMOT aided and abetted those breaches. These allegations state claims

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[21]A motion to dismiss can be granted only where, assuming the truth of the allegations, it is clear as a matter of law that the complaint fails to state any valid claim for which relief can be granted. See Utah R. Civ. P. 12(b)(6); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

[22]Neither Royal Street nor Morgan-Fidelity challenged the merits of United Park's claims that these two defendants, as co-shareholders with United Park in a closely-held corporation--GPCC--owed fiduciary duties of loyalty and fairness to United Park, and breached those duties by taking unfair advantage of United Park in the division of GPCC's assets under the 1975 Resort Agreements. See, e.g., Shane v. Shane, 891 F.2d 976, 986 (1st Cir. 1989) ("shareholders in a closely-held corporation owe one another a duty of utmost good faith and loyalty that requires full disclosure"); Alaska Plastics, Inc. v. Coppock, 621 P.2d 270, 276 (Alaska 1980) ("stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another"); Delaney v. Georgia-Pacific Corp., 564 P.2d 277, 281 (Or. 1977) (en banc) (equal owners of close corporation are entitled to each other's performance of fiduciary duties of loyalty, good faith, and full disclosure); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 (Mass. 1975) (same holding as Alaska Plastics); Nash v. Craigco, Inc., 585 P.2d 775, 776 (Utah 1978) (controlling shareholder of close corporation owes fiduciary duty to deal fairly and openly with other shareholders).

against GPCC and AMOT.[23]

United Park presented substantial evidence that GPCC and AMOT aided and abetted these breaches of fiduciary duty by Anaconda, ASARCO, Royal Street and Morgan-Fidelity. GPCC mismanaged its affairs between 1971 and 1975, creating the financial difficulties that ultimately led to the division of GPCC pursuant to the 1975 Resort Agreements. GPCC refused to take reasonable steps to solve its difficulties, such as selling off certain properties, because Royal Street, GPCC's manager, wanted those properties for itself. It defaulted on its obligations to United Park, but at the same time did not default on obligations to other land vendors. (R. 4782) There is also evidence that GPCC officials told S. N. Cornwall that the GPCC properties had no value in 1975, when at the same time it was representing in prospectuses given to potential investors that the properties were worth $37.8 million.[24] VanCott, while representing GPCC and Royal Street, prepared the false and misleading Proxy Statement. Through these acts, GPCC induced the breach of fiduciary duty by Anaconda and ASARCO, and substantially assisted the breaches of duty by Royal Street and Morgan-Fidelity.

AMOT also substantially assisted the breaches by Anaconda and ASARCO, and Royal Street and Morgan-Fidelity. When AMOT began negotiations with Royal Street and Morgan-Fidelity in the Spring of 1975, the owners of Aspen and Vail were still interested in pursuing discussions. AMOT knew the values of the real property and the ski resort from the GPCC Prospectuses. It joined with Morgan-Fidelity in insisting that United Park agree to two additional 20-year extensions on the Ski Leases, even though

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[23]It is no answer for AMOT to claim that it owed fiduciary duties to its own shareholders. Those duties do not absolve AMOT from liability for inducing breaches by United Park's fiduciaries. See, e.g., Gilbert v. El Paso Co., 490 A.2d 1050, 1057 (Del. Ch. 1984); Penn Mart Realty Co. v. Becker, 298 A.2d 349, 351-52 (Del. Ch. 1972).

[24]There is also evidence that GPCC failed to disclose to Cornwall the Salomon restructuring proposals, under which United Park would have retained its equity interest in GPCC. See supra at 18, fn. 4.

United Park was to receive wholly inadequate consideration for those extensions.

AMOT played a major role in assuring that United Park shareholders approved the 1975 Resort Agreements and that there would be no legal opposition. After receipt of the Gartner letter, Mr. Badami of AMOT joined the other parties to the Agreements at a meeting in the VanCott offices and was "coached" as to how to insure shareholder approval. Badami told the shareholders that the meeting must not be postponed and essentially vouched for the adequacy of the Proxy Statement and the fairness of the 1975 Resort Agreements. He then disparaged the Gartner letter as a "diatribe of misfacts" and factually misrepresented the content of the Gartner letter by telling the shareholders that Gartner believed that United Park was giving up mineral rights. (R. 5941-42) See also supra at 40-41. Badami's false and misleading attack on the Gartner letter was clearly part of an orchestrated effort by Badami, Anaconda and ASARCO through their control of United Park management, and other defendants, to convince the shareholders that Gartner's position had no merit and should be ignored. At a minimum, AMOT played a critical role in insuring that United Park shareholders were pressured into taking a hasty vote on inadequate information and that shareholders would not challenge the transaction.

These facts squarely contradict the district court's finding that Badami's statements were "opinions only." (R. 7828, ¶ 25) Badami made at least one misrepresentation of fact, because he misrepresented the content of the Gartner letter. Equally important, the court's findings that United Park's shareholders did not rely and were not entitled to rely on Badami's "opinions" misstate both fact and law. Once Mr. Badami volunteered to speak at the meeting, he had a duty to speak truthfully and to disclose all material facts. See, e.g., Christenson v. Commonwealth Land Title Ins. Co., 666 P.2d 302, 306 (Utah 1983); Uptegraft v. Dome Petroleum Corp., 764 P.2d 1350, 1353-54 (Okla. 1988); Meeker v. Lanham, 604 P.2d 556, 558-59 (Wyo. 1979). Even if Badami's statements at the meeting were opinions only, they are actionable because they were made without a reasonable basis or genuine belief as to their truth, and Badami intended others to rely on them. See, e.g., Meeker v. Lanham, 604 P.2d at 558; Restatement (Second) of Torts § 525 (1977).

Further, the court's finding that Badami's statements "were not detrimentally relied upon by the UPCM shareholders" (R. 7828, ¶ 25), is unsupported in the record and gives AMOT the benefit of an inference to which it is not entitled. Badami attended the meeting at the invitation of United Park management and Anaconda and ASARCO after he was "coached" how to help obtain shareholder approval. He was presented to the shareholders in a context in which management was clearly urging the shareholders to rely on Mr. Badami in deciding whether to adjourn the meeting in order to permit fuller disclosure. After Badami's presentation, the shareholders voted not to adjourn the meeting, consistent with the wishes of Anaconda and ASARCO. Given these facts, the court could not properly conclude, as a matter of law, that the shareholders did not rely on Badami.

VI. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING UNITED PARK'S PRAYER FOR REFORMATION OF THE RESORT AGREEMENTS.

In addition to its damage claims, United Park seeks reformation of the 1975 Resort Agreements to remedy the unconscionable unfairness of those agreements resulting from defendants' breaches of fiduciary duty and aiding and abetting such breaches.[25] While styled as "reformation," United Park's claim is that because the 1975 Resort Agreements are unconscionable, the court may, on equitable grounds, refuse to enforce the unconscionable provisions, or construe the agreements to avoid an unconscionable result.

[25] In its Amended Complaint, United Park prayed for other alternative remedies, including rescission and termination of the 1975 Resort Agreements. United Park does not pursue those remedies on this appeal.

See Resource Management Co. v. Weston Ranch and Livestock Co., 706 P.2d 1028, 1040-41 (Utah 1985); Bekins Bar V Ranch v. Huth, 664 P.2d 455, 459 (Utah 1983). Specifically, United Park seeks a construction of the Water Agreement to permit United Park to use its prior reservation of 2,850 gallons per minute of Group II water for all purposes rather than simply for "mining, milling and related purposes" as the agreement presently provides. United Park also asks the Court not to enforce the two additional extensions of the Ski Leases given in 1975. These remedies are appropriate because the 1975 Agreements are both procedurally and substantively unconscionable. The district court dismissed United Park's reformation claims as a matter of law. This was error.

A. Reformation Is An Appropriate Remedy Because the 1975 Resort Agreements Were Unconscionable.

The 1975 Resort Agreements were unconscionable, both procedurally and substantively. The Agreements required United Park shareholder approval to be effective. From the perspective of the shareholders, the Agreements bore many of the classic indicia of procedural unconscionability.[26] The negotiations were not at arms length; indeed there were no negotiations. United Park's controlling shareholders dictated United Park's position -- to get out of the resort and land development business -- and did not attempt to protect United Park's equity interest in GPCC, including GPCC's resort operations and development properties. The Proxy Statement was demonstrably false and misleading. When a few shareholders raised questions, they were told that the Agreements were "very complex and difficult to understand" (R. 7252), but that the shareholders should trust management. When Gartner requested that

[26]As this Court has stated, "[i]ndices of procedural unconscionability include . . . phrasing contractual terms in language that is incomprehensible to a layman . . . ; hiding key contractual provisions in a maze of fine print . . . ; minimizing key contractual provisions by deceptive sales practices; lack of opportunity for meaningful negotiation, . . . ; [and] whether the aggrieved party was compelled to accept the terms . . . ." Resource Management, 706 P.2d at 1042 (citations omitted).

consideration of the Agreements be deferred to permit fuller disclosure, Anaconda and ASARCO and management directed the special meeting to proceed. Management, with Badami's help, coerced a quick vote by claiming that time was of the essence and that GPCC and the Park City Resort would cease to operate if the Agreements were not immediately approved.[27]

These facts clearly demonstrate that United Park shareholders, in approving the 1975 Resort Agreements, were confronted by an "absence of meaningful choice", the essence of procedural unconscionability. Resource Management, 706 P.2d at 1042, quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

The 1975 Resort Agreements were also substantively unconscionable[28] at the time of their making.[29] For $2,000, United Park relinquished its 39% equity interest in GPCC, which was critical to its 1971 sale of land and water to GPCC at discounted prices and for which it had paid nearly $1 million. (R. 6627-28) It sold land and a world class ski

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[27]Management knew the terms of the 1975 Resort Agreements as early as May 1975. Yet, it waited until early September to distribute the Proxy Statement and scheduled the meeting for early October. By that point in the year, defendants could and did coerce a quick vote by claiming that immediate approval was required if the ski resort was to open for the winter season. (R. 5941-42) However, it would have been possible to disseminate the Proxy Statement and hold the Special Meeting much earlier in the year.

[28]Substantive unconscionability is indicated by "contract terms so one-sided as to oppress or unfairly surprise an innocent party; an overall imbalance in the obligations and rights imposed by the bargain; excessive price; or significant cost-price disparity." Resource Management, 706 P.2d at 1041-42 (citations omitted).

[29]United Park alleged in its Amended Complaint, and demonstrated on summary judgment, that the 1975 Resort Agreements were unconscionable when entered into. It also argued that the Water Agreement has become even more unconscionable with the passing of time, due to events not foreseen in 1975. The district court purported to dismiss United Park's claim for reformation because United Park was attempting to prove unconscionability through subsequent events alone. (R.7844, ¶ 21) That was error because United Park also claims contemporaneous unconscionability. It was also error because "a court is not powerless in equity to remedy that which it perceives as present unconscionability, and may refuse to enforce a contract that, while equitable when made, has become unconscionable with passage of time." Resource Management, 706 P.2d at 1045-46 (quotation omitted).

resort worth well over $40 million for $5 million payable over an extended period of time. It sold water worth more than $2 million in 1975 for a present value payment of $350,000 (R. 4762-63). It leased its land for minimal rentals for the first 40 years and then agreed to an additional 40 years, again for essentially no consideration. See supra at 22-23. These terms manifest an excessively low price and an inexplicably unfair cost-price disparity. In sum, they are unconscionable.

In the court below, defendants produced no evidence that the 1975 Resort Agreements were fair to United Park and the court made no finding that the Agreements were not unconscionable. The district court erred in dismissing United Park's claim for reformation.

B. The District Court Erred In Holding That United Park Has Waived Or Is Estopped From Seeking Reformation.

The district court's dismissal of United Park's reformation claim appears to be based on two grounds. First, the court suggested that United Park could not seek reformation because it continued to accept payment from defendants under the 1975 Resort Agreements and, as of January 1990, the purchase price under the Water Agreement had been fully paid. (R. 7838, ¶ 7) Second, it held that United Park was barred from seeking reformation against Royal Street because in 1981 and 1982 United Park had signed Estoppel Certificates and had consented to mortgages on the Deer Valley Resort given to Wells Fargo by Royal Street. (R. 7841-42, ¶¶ 17-19) These legal conclusions were error.

The focus of a claim of unconscionability is the fairness of the contract terms, and the circumstances surrounding its formation, not on the performance of either party. See Resource Management, 706 P.2d at 1041-49. Furthermore, the court may account for performance by the party against whom relief is sought by partially enforcing the contract so that the performing party is compensated, but the contract as enforced is not unconscionable.[30]

The court's reliance on the fact that United Park continued to accept payments under the various contracts suggests notions of waiver or estoppel. To establish waiver, defendants must prove that United Park intentionally relinquished a known right. Morgan v. Quailbrook Condo Co., 704 P.2d 573, 578 (Utah 1985); Masters v. Worsley, 777 P.2d 499, 503 (Utah App. 1989); to establish estoppel, defendants must prove that they justifiably relied to their detriment on United Park's conduct. Rothey v. Walker Bank & Trust Co., 754 P.2d 1222, 1224 (Utah 1988); Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 602 P.2d 689, 694 (Utah 1979). Defendants must prove each element of waiver or estoppel by clear and convincing evidence. See Corporation Nine v. Taylor, 513 P.2d 417, 420 (Utah 1973); Mercer v. State, 739 P.2d 703, 706 (Wash. App. 1987); Kenneth D. Collins Agency v. Hagerott, 684 P.2d 487, 490 (Mont. 1984).

Defendants, however, presented no evidence to support either waiver or estoppel, much less establish waiver or estoppel as a matter of law. The only evidence is that United Park accepted payments under the Agreements before new management investigated and discovered United Park's claims. Shortly after United Park discovered its claims, it put defendants on notice that it was challenging the 1975 Resort Agreements and was seeking equitable remedies, including reformation. (R. 2-85; 6732-42; 6744-47) Defendants continued to make payments after that notice with knowledge of United Park's claims and there is no evidence whatsoever they have been unfairly prejudiced. Defendants owed the money in all events, because they have had beneficial use of the properties.

[30]Acceptance of benefits under a contract does not bar a claim for reformation. See, e.g., Gablick v. Wolfe, 469 P.2d 391, 396 (Alaska 1970); Nab v. Hills, 452 P.2d 981, 988 (Idaho 1969).

Similarly, the Wells Fargo Estoppel Certificates do not bar United Park's unconscionability claim. The Estoppel Certificates state only that, as of 1981 and 1982, United Park was not aware of any defaults under the Deer Valley Lease. (R. 4473-74; 4482-84) They say nothing about potential claims against Royal Street for breach of fiduciary duty. The record does not establish who drafted the Estoppel Certificates because United Park has not yet had discovery on that issue; however, United Park is entitled to the reasonable inference that Wells Fargo drafted the certificates, which should be construed against it. See Hoffman v. Life Ins. Co. of North America, 669 P.2d 410, 416 (Utah 1983) (contract language construed against drafting party). Thus, the record does not support the legal conclusion that United Park intentionally relinquished a known right to seek reformation of the Ski Leases or the Water Agreement against Royal Street on the basis of unconscionability when it executed the Estoppel Certificates.

Moreover, Wells Fargo made no factual showing of any undue prejudice to support an estoppel of United Park's reformation claims. Reformation of the Water Agreement to permit United Park to use its reserved water for all purposes cannot possibly prejudice Wells Fargo. Due to United Park's prior reservation of water for mining, milling and related purposes, neither Royal Street nor its lender, Wells Fargo, could have relied on that water. As to United Park's prayer that the two 20-year lease extensions given in 1975 for no consideration be cancelled, Wells Fargo made no showing that, or to what extent, its security would be impaired.[31] Given defendants failure to establish any detrimental reliance, the district court's dismissal of United Park's unconscionability claims must be reversed.

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[31]Neither did Wells Fargo make any showing of prejudice that would estop United Park from its alternative reformation claim that defendants should be required to pay a fair rental under the Ski Leases if the extensions are not cancelled.

VII. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING UNITED PARK'S CLAIMS FOR BREACH OF THE RESORT AGREEMENTS.

United Park alleges that GPCC and Royal Street breached the 1975 Agreements, and presented substantial evidence of these breaches in opposition to summary judgment. The district court granted summary judgment dismissing these claims on the grounds that (1) GPCC and Royal Street cured any alleged breach of the Water Agreement by making payment in full thereunder, and (2) that United Park has "waived and is estopped from asserting" all pre-August 1985 claims for breach of contract and lease against GPCC and Royal Street, and all continuing breaches that began before August 1985, "based on statements in its annual reports that GPCC and Royal Street were current on all agreements, and its certifications to the escrow agent that GPCC and Royal Street had paid all amounts of lift revenue that were owed." (R. 7835-36, ¶ 61)[32] This was error.

United Park's Twelfth Claim for Relief alleges in part that GPCC and Royal Street breached paragraph 14 of the Water Agreement by opposing in bad faith United Park's applications to the State Engineer for extensions of time to resume use of certain water rights. (R. 2835-40) The Water Agreement reserves to United Park the prior right to use for "mining, milling and related purposes" up to 2850 gallons per minute from eleven underground water claims. These reservations include five claims that United Park is not currently using, but will use if mining activity resumes. When United Park is not using the water, the Water Agreement gives GPCC and Royal Street the right and the affirmative obligation to use the water to protect it from forfeiture. Royal Street has not used this water and GPCC refuses to tell United Park whether it uses the water, how it uses the water, or how much it uses. (R. 4825; 4831)

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[32]The district court held that United Park's breach of contract claims, to the extent those claims arose before May 1980, were barred by the six year statute of limitations. While erroneous in certain respects, this conclusion is irrelevant because United Park seeks recovery only for breaches occurring after that date.

To protect its right to use the water in the future, United Park filed the applications for extensions with the State Engineer in April 1987. GPCC and Royal Street filed written protests and opposed the applications at a hearing, jeopardizing both title to the water rights and United Park's prior reservation for future use. (R. 4831-32) These actions violate Paragraph 14 of the Water Agreement, which prohibits GPCC and Royal Street from taking any action without the written approval of United Park "which will or might jeopardize or impair the rights of the parties with relation to the Purchased Flow or the Purchased Rights." (R. 5098) Their protests were made in bad faith and are continuing violations of the Water Agreement.

United Park's Fifth Claim alleges in part that GPCC has breached Paragraph 5 of the Water Agreement, by refusing to pay the cost of treating water from the portal of United Park's Ontario No. 2 Drain Tunnel. (R. 2818-19) Paragraph 5 requires that GPCC shall accept water "in the condition in which it reaches the point of delivery" and "at its sole expense, treat or purify the Purchased Flow to the extent that the same is necessary before it may be used for the purposes of" GPCC. (R. 5091) Because water from the Ontario No. 2 Drain Tunnel flows into the Provo River, federal and state law require it to be treated when it flows from the tunnel portal. For the past several years, United Park has treated the water at a cost of $2,650,000 (R. 4833), even though Paragraph 5 of the Water Agreement clearly imposes the obligation and cost of treatment on GPCC. Since 1985, United Park has repeatedly demanded that GPCC pay the treatment costs, which increase each year, but GPCC has refused. Id.

United Park's Fifth Claim also alleges that GPCC and Royal Street have understated their lift revenue and paid United Park substantially less than United Park is entitled to receive under the Ski Leases. (R. 2819-26) United Park audited the lift revenue accounting records for the first time in 1985, and discovered that GPCC and Royal Street have been exchanging lift passes for goods and services, and issuing complimentary or discounted passes. GPCC and Royal Street have failed to include the value of the exchanges and discounts in the lift revenues, resulting in an underpayment to United Park. (R. 4787-88)

The district court erred in dismissing these claims. First, the fact that GPCC and Royal Street made final payment under the Water Agreement in January 1990 does not render moot United Park's claims for breach of that Agreement. GPCC and Royal Street have breached contractual obligations -- to pay for water treatment and to avoid jeopardizing United Park's water rights -- that are clearly continuing in nature. Those obligations are not extinguished upon payment of the purchase price.

Second, the district court's finding that United Park has waived or is estopped from asserting these claims is nonsensical. The district court based its findings of waiver and estoppel solely on statements in United Park Annual Reports between 1976 and 1984 to the effect that defendants were current on all obligations under the Resort Agreements, and on certifications United Park made to the escrow agent that the defendants had paid all sums due under the Ski Leases.

These general statements cannot constitute waiver or estoppel.[33] United Park cannot have waived its claims for understatement of lift revenue when United Park did not discover the understatements until it first audited the records in 1985. (R. 4787) And United Park cannot have waived its claims for payment of water treatment when United Park has demanded that GPCC pay these costs since 1985. (R. 4833) None of the statements in the Annual Reports or to the escrow agent support a finding that United Park intentionally relinquished a known right.

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[33]Again, waiver requires proof of an existing right, knowledge of its existence, and an intention to relinquish it. Masters v. Worsley, 777 P.2d 499, 503 (Utah App. 1989). Estoppel requires proof of a statement or act by the party asserting the claim inconsistent with the claim, action by the other party in reliance on the statement or act, and injury to the party from the reliance. Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 602 P.2d 689, 694 (Utah 1979).

The district court's findings also fail to address the two crucial elements of estoppel. There is no evidence that defendants relied to their detriment on statements in the Annual Reports or to the escrow agent. Defendants cannot show how the statements caused them to protest in bad faith United Park's applications for extensions, to fail to pay the costs of water treatment, or to understate lift revenue. Nor can they show detriment or injury as a result. The only effect has been to their benefit, because GPCC and Royal Street have paid less to United Park than they are required, and GPCC has wrongfully avoided paying the costs of water treatment.

VIII. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING UNITED PARK'S TRESPASS CLAIMS.

United Park's Seventh Claim for Relief alleges that GPCC has committed trespass by constructing a maintenance building and a ski lift tower (the "Town Lift") on United Park property not leased to GPCC. The district court erroneously found that both trespass claims "fail" because of United Park's contractual duties of cooperation with GPCC under Paragraph 19 of the Land Purchase Agreement (R. 7845, ¶ 23), because of United Park's "written and verbal consent to GPCC's use of the land in question," id., and because the Town Lift was constructed on property subject to the Resort Area Lease. (R. 7844-45, ¶ 22) These findings were error.

Contrary to the district court's finding, paragraph 19 of the Land Agreement does not require United Park to grant easements for the maintenance building or for the construction of ski lifts on United Park's property.[34] Further, United Park did not

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[34]Paragraph 19 of the Land Agreement only provides that United Park

> will, upon request, grant to [GPCC] such easements over its properties as may be reasonably necessary for ingress and egress to and from any of the Subject Properties, provided that the nature and duration of such easements shall be subject to the approval of [United Park] and the use thereof shall be subject to such reasonable conditions and restrictions as [United Park] shall impose. (R. 4913)

consent to GPCC's construction of the maintenance building or the Town Lift. (R. 4849-52)[35]

Finally, the district court erred in holding, as a matter of law, that the Town Lift property was subject to the Resort Area Lease. (R. 7844-45, ¶ 22) Paragraph 14 of the Resort Area Lease gives United Park the right to sell certain ski lease property to third parties if the lessee is not using the property. (R. 5319-21) In 1980, United Park gave John Sweeney an option to purchase 75 acres, including the property where GPCC built the Town Lift. The Resort Area lease gave GPCC a right of first refusal to match Sweeney's offer, but GPCC did not do so. (R. 4854) Sweeney never exercised the option, which expired in 1984. (R. 4855)

In December 1980, United Park, GPCC and GPI entered into the Third Amendment to the Resort Area Lease, which deleted the Sweeney option parcel from the lands subject to the Resort Area Lease. (R. 5379-83; 4854) At the time, United Park and GPCC both knew that Sweeney had an option to purchase the property, and that, by definition, options need not be exercised. The Third Amendment to the Resort Area Lease makes no mention of the Sweeney option and is not conditioned in any way on Sweeney's exercise of the option. The district court's conclusion that the Amendment became effective only if United Park sold the property (R. 7844-45, ¶ 22) is inexplicable, unsupported, and squarely contradicted by the plain language of the Amendment. United Park and GPCC removed the Town Lift property from the resort area lease in 1980, whether or not

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[35]In the court below, GPCC flatly misrepresented the deposition testimony of LaMar Osika when it claims Mr. Osika testified that United Park consented to GPCC's use of these United Park properties. (R. 3733). In fact, Mr. Osika testified that, in response to a letter (R. 7976) from GPCC to United Park dated July 15, 1974, requesting that United Park give GPCC a blanket agreement permitting GPCC to use United Park lands for ski lifts and skiing, "I don't think [the requested agreement] was provided . . . . (R. 7945, p.214). Similarly, certain correspondence cited by GPCC (R. 7155-58; 7976, Ex. 50, 51) only involved proposed easements over the Thaynes and Spiro Tunnel mining reservations for ski lifts and run. It provided no support for the claim that United Park consented to the maintenance building trespass or the Town Lift trespass.

Sweeney ever purchased it. GPCC's construction of the Town Lift, in the face of United Park's protest, is trespass. At a minimum, these facts precluded summary judgment.

CONCLUSION

The judgment dismissing United Park's Amended Complaint must be reversed and the case remanded for the completion of discovery and trial.

DATED this 17 day of December, 1990.

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Third Judicial District

MAY 15 1990

By E. Matheson Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

UNITED PARK CITY MINES COMPANY, a Delaware corporation, Plaintiff,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
vs.	)	
GREATER PARK CITY COMPANY, a Utah Corporation, et al. Defendants.	)	Civil No. C-86-3347 Judge Pat B. Brian

Defendants Atlantic Richfield Company's ("ARCO") and Defendant ASARCO, Inc.'s ("ASARCO") Motions for Summary Judgment came on for hearing before the court, the Honorable Pat B. Brian, Judge, on April 4, 1990. Richard D. Burbidge and Stephen B. Mitchell of Burbidge & Mitchell appeared on behalf of Defendant Atlantic Richfield Company, Merlin O. Baker of Ray, Quinney & Nebeker appeared on behalf of Defendant ASARCO, and

David K. Watkiss and David B. Watkiss of Watkiss & Saperstein appeared on behalf of Plaintiff United Park City Mines Company. The court having considered the Memoranda, Affidavits and Exhibits filed in connection with the motions by the parties, having taken the matter under advisement, and having previously entered its Memorandum Decision granting the motions, finds that there are no genuine issues of material fact with regard to the following:

FINDINGS OF FACT

1. In 1975, three "independent" directors served on the United Park City Mines Company's ("UPCM") Board of Directors when the restructuring plans and Resort Agreements involving the Greater Park City Company ("GPCC") were considered and approved by the seven-member Board of Directors.

2. At the time the restructuring agreement was approved, ARCO and ASARCO each had two directors on the UPCM Board of Directors. There were also three independent directors serving on the Board.

3. The independent directors of UPCM had full knowledge concerning the terms of the restructuring and its effect upon UPCM and voted in favor of the restructuring.

4. The three independent directors were not implicated in any alleged wrong-doing, did not have any conflict of interest and were fully informed of all the material facts

involving the 1975 restructuring plan and the subsequent execution of the Resort Agreements.

5. The leases and agreements relating to the 1975 Resort Agreements, involving the restructuring of GPCC, were reviewed and approved by the three independent members on the UPCM Board of Directors.

6. At the annual meeting of shareholders of UPCM held in May, 1975, the shareholders were informed of the restructuring proposals and were informed that these proposals would be submitted to a vote of the shareholders in October, 1975.

7. On or about September 2, 1975, a proxy statement was sent to all shareholders of UPCM, which stated in detail what UPCM was giving and what it was receiving as part of the proposed restructuring.

8. Shortly before the special meeting of shareholders on October 7, 1975, the UPCM Board of Directors received several written complaints from shareholders, including a detailed milti-paged letter from Jerome Gartner, an attorney representing a shareholder named Timothy Donath.

9. Shareholder Donath demanded that the meeting be postponed and that the directors reconsider their decision to approve the restructuring. Several shareholders complained that the restructuring was unfair to UPCM and that the proxy sent to shareholders was incomplete and missing important information.

10. Shareholder Donath's letter was reviewed and discussed by the Board of Directors of UPCM, including the independent directors. The directors voted to proceed with the shareholders meeting. Donath's letter was disclosed to the shareholders at the special meeting on October 7, 1975.

11. The special shareholders meeting was held on October 7, 1975, and more than ninety percent (90%) of the shareholders approved the restructuring plan.

12. In 1975, the shareholders of UPCM had actual knowledge of the restructuring plan and the leases and agreements relating thereto, or they were put on notice of facts which would lead a person of ordinary prudence to discover the alleged wrong-doing, sufficient to commence the running of the statute of limitations.

13. In 1985, Loeb Investments purchased all of the stock of ARCO and ASARCO in UPCM. Loeb does not dispute that it paid a fair price for the stock. The stock was purchased with knowledge that the assets of UPCM did not include those which had been given up in the 1975 restructuring.

The court, having made its Findings of Fact, now makes and enters its:

CONCLUSIONS OF LAW

1. In 1975, UPCM, through three independent directors on its seven-member Board of Directors, and through several

shareholders, knew or should have known of any alleged wrongdoing resulting from the 1975 restructuring plan and the execution of numerous leases and agreements relating to the 1975 restructuring plan and Resort Agreements.

2. The claims against ARCO and ASARCO contained in the First and Second Claims for Relief of UPCM's Complaint are barred by the three-year statute of limitations contained in Utah Code Annotated, § 78-12-27.

3. It would be inequitable and constitute a windfall for Loeb Investments or the Bamberger Group, which together now control UPCM, to receive any benefit resulting from suit against ARCO and ASARCO from whom the control stock was purchased.

4. Therefore, the First, Second, Third and Fourth Claims for Relief are also precluded by the doctrine enunciated in Bangor-Punta Operations v. Bangor and A.R. Co.

5. No genuine issues of material fact exist regarding UPCM's allegations against ARCO and ASARCO. Therefore, Defendant is entitled to Summary Judgment as a matter of law dismissing all claims for relief contained in UPCM's Complaint.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Summary Judgment shall be and the same hereby is entered in favor of Atlantic Richfield Company and ASARCO, Inc. and against Plaintiff United Park City Mines Company dismissing with prejudice the Amended Complaint on file herein in its entirety against Defendants Atlantic Richfield Company and ASARCO.

DATED this 15 day of ~~April~~ May.

BY THE COURT:

Pat B. Brian

THE HONORABLE PAT B. BRIAN
THIRD DISTRICT COURT JUDGE

js arco\findord

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a copy of the proposed Findings of Fact, Conclusions of Law and Order to the following parties by depositing the same in U.S. mails, postage prepaid, this 19th day of April, 1990:

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FILED DISTRICT COURT
Third Judicial District

MAY 15 1990

SALT LAKE COUNTY
By E. Matheson
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

UNITED PARK CITY MINES COMPANY, a Delaware corporation Plaintiff, vs. GREATER PARK CITY COMPANY, a Utah corporation; et al., Defendants. WELLS FARGO BANK, N.A., Intervenor.	FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER GRANTING MOTIONS TO DISMISS OR FOR SUMMARY JUDGMENT OF DEFENDANTS GREATER PARK CITY COMPANY, ALPINE MEADOWS OF TAHOE, INC., MORGAN GUARANTY TRUST COMPANY OF NEW YORK, FIDELITY BANK OF PHILADELPHIA, GREATER PROPERTIES, INC., PARK PROPERTIES, INC., ROYAL STREET LAND COMPANY, DEER VALLEY RESORT COMPANY, ROYAL STREET OF UTAH, ROYAL STREET DEVELOPMENT COMPANY, INC., and INTERVENOR WELLS FARGO BANK, N.A.
GREATER PROPERTIES, INC., a Delaware corporation, et al., Plaintiffs, vs. FIRST SECURITY BANK OF UTAH, N.A., a national banking association; et al., Defendants.	Civil No. C-86-3347 and Civil No. C-86-8907 Judge Pat B. Brian

NCE, YEATES
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The Motions to Dismiss of defendants Atlantic Richfield Company ("ARCO"); ASARCO, Inc. ("ASARCO"); Greater Park City Company ("GPCC"); Royal Street Land Company, Deer Valley Resort Company, Royal Street of Utah and Royal Street Development Company, Inc. (all collectively referred to as "Royal Street" or the "Royal Street defendants"); Alpine Meadows of Tahoe, Inc. ("AMOT"); Morgan Guaranty Trust Company of New York ("Morgan"); Fidelity Bank of Philadelphia ("Fidelity"); Greater Properties, Inc. ("GPI"); Park Properties, Inc. ("PPI"); and intervenor Wells Fargo Bank, N.A. ("Wells Fargo"), pursuant to U.R.C.P. 12(b), and for Summary Judgment, pursuant to U.R.C.P. 56, seeking dismissal of plaintiff United Park City Mines Company's ("UPCM") Amended Complaint came on for hearing before the Court on April 4, 1990.

All parties were represented by counsel. Plaintiff UPCM was represented by its counsel, David K. Watkiss, David B. Watkiss and Perrin R. Love; defendant ARCO was represented by its counsel, Richard D. Burbidge and Stephen B. Mitchell; defendant ASARCO was represented by its counsel, Merlin O. Baker and Jonathan A. Dibble; defendants GPCC and AMOT were represented by their counsel, Gordon Strachan and James A. Boevers; defendants Morgan, Fidelity, GPI and PPI were represented by their counsel, Gordon Roberts and Elisabeth R.

Blattner; the Royal Street defendants were represented by their counsel, Wendy A. Faber and Richard W. Giauque; and intervenor Wells Fargo was represented by its counsel, Michael F. Jones.

Prior to the hearing, the parties submitted voluminous legal memoranda, affidavits and exhibits. The Court heard oral argument from all parties for approximately 3-1/2 hours. Thereafter, all parties filed proposed Findings of Fact and Conclusions of Law at the Court's request. The Court, having read the memoranda and affidavits, having heard oral argument, having considered the proposed Findings and Conclusions, and having entered Memorandum Decisions with respect to each of the defendants' and intervenor's motions, hereby makes the following Findings of Fact, Conclusions of Law and Order with respect to the motions to dismiss or for summary judgment of defendants GPCC, Royal Street, AMOT, Morgan, Fidelity, GPI, PPI and intervenor Wells Fargo. These Findings and Conclusions constitute the written statement of the grounds for the Court's decision under U.R.C.P. 52(a).

I. FINDINGS OF FACT

1. UPCM has had adequate opportunity to conduct discovery relating to the issues in the motions to dismiss or for summary judgment.

2. Based upon the record, there is no genuine dispute as to any of the following material facts.

A. BACKGROUND

3. In February, 1971, GPCC entered into the following Resort Agreements with UPCM.

4. Pursuant to the Land Purchase Agreement UPCM agreed to sell to GPCC approximately 4,200 acres of real property for commercial, condominium and subdivision development, including the base facilities, golf course, other resort improvements and the personal property of the existing resort operations for the sum of $5.4 million, payable over time.

5. UPCM entered into three separate ski leases with GPCC wherein it leased 432 acres known as Crescent Ridge [Lease (Crescent Ridge)], 470 acres in Deer Valley [Lease (Deer Valley)] and 5,631 acres which included the then existing ski runs [Lease (Resort Area)].

6. Pursuant to the Water Rights Purchase Agreement UPCM agreed to sell its water rights to GPCC for $500,000, but reserved the right to use a portion of the water for mining and related activities.

7. In 1975, the shareholders of GPCC (including UPCM, Royal Street, Morgan, Fidelity and non-party Union America) decided to restructure GPCC to solve certain financial problems GPCC had encountered.

8. In 1975, ARCO owned 18.4% of UPCM's stock and ASARCO owned 12.7%.

B. THE STATUTE OF LIMITATIONS ON THE THIRD AND FOURTH CLAIMS (AMOT, GPCC, ROYAL STREET, MORGAN, FIDELITY)

9. In 1975, three directors independent of ARCO and ASARCO served on the UPCM Board of Directors when the restructuring plans and Resort Agreements involving GPCC were considered and approved by the seven-member UPCM Board of Directors.

10. At the time the restructuring agreement was approved, ARCO and ASARCO each had two directors on the UPCM Board of Directors, in addition to the three independent directors serving on the Board.

11. The independent directors of UPCM had full knowledge concerning the terms of the restructuring and its effect upon UPCM and voted in favor of the restructuring.

12. The three independent directors were not implicated in any alleged wrongdoing, did not have any conflict of interest and were fully informed of all the material facts involving the 1975 restructuring plan and the subsequent execution of the Resort Agreements.

13. The leases and other agreements relating to the 1975 Resort Agreements involving the restructuring of GPCC were

approved by the three independent Board members on UPCM's Board of Directors.

14. At the annual meeting of UPCM shareholders held in May, 1975, the shareholders were informed of the restructuring proposals and were told that these proposals would be submitted to a vote of the shareholders in October, 1975.

15. On or about September 2, 1975, a proxy statement was sent to all shareholders of UPCM. The proxy statement stated in detail what UPCM was giving and what it was receiving as part of the proposed restructuring.

16. Shortly before the special meeting of shareholders on October 7, 1975, the UPCM Board of Directors received several written complaints from shareholders, including a detailed multi-page letter from Jerome Gartner, an attorney representing a shareholder named Timothy Donath.

17. Shareholder Donath demanded that the meeting be postponed and that the directors reconsider their decision to approve the restructuring. Several shareholders complained that the restructuring was unfair to UPCM and that the proxy statement sent to shareholders was incomplete and missing important information.

18. Shareholder Donath's letter was reviewed and

discussed by the UPCM Board of Directors, including the independent directors. The directors voted to proceed with the shareholders meeting. Donath's letter was disclosed to the UPCM shareholders at the special meeting on October 7, 1975.

19. At the UPCM special shareholders meeting held on October 7, 1975, 96.4 percent in interest of the shareholders who voted approved the restructuring plan either at the meeting or by proxy, which represented 60.2 percent of the total outstanding shares.

20. In 1975, the shareholders of UPCM had actual knowledge of the restructuring plan and the leases and agreements relating thereto or they were put on notice of facts which would lead a person of ordinary prudence to discover the alleged wrongdoing, sufficient to commence the running of the statute of limitations.

C. THIRD AND FOURTH CLAIMS (AMOT)

21. The adversary relationship in 1975 between AMOT as the buyer of GPCC, and UPCM as the seller, precluded any fiduciary duty from AMOT to UPCM. No such duty was created by AMOT's pre-October 7, 1975 assistance in opening the resort for the 1975-1976 ski season. All parties benefitted from the timely opening of the ski resort.

22. AMOT did not induce or encourage any person, party or entity to breach any alleged fiduciary duties.

23. AMOT's participation was minimal in preparing and approving the proposed restructuring, including the two 20-year extensions of the Lease (Resort Area). These transactions were agreed upon in substance by the other parties and UPCM prior to being presented to AMOT for approval.

24. Prior to being presented to AMOT, the restructuring proposal had been rejected by other potential investors.

25. The statements of AMOT's Board Chairman, Mr. Badami, at the October 7, 1975 UPCM shareholders meeting, called to approve the proposed restructuring, were opinions only and were not detrimentally relied upon by the UPCM shareholders.

26. More than 62 percent in interest of the UPCM stockholders had voted by proxy on the proposed restructuring and did not attend the October 7, 1975 meeting.

27. AMOT did not participate in the preparation or submission of the proxy materials sent to UPCM shareholders.

28. AMOT was not involved in the restructuring plan until 1975.

29. AMOT had no business relationship with any of the participants in the restructuring proposal until 1975.

30. In 1975, AMOT did not have knowledge superior to

UPCM officers and directors, who were independent of ARCO and ASARCO, including, among others, UPCM President and Director Miles Romney, UPCM Director Harold Steele, and UPCM Secretary-Treasurer Lamar Osika. These individuals also either served on GPCC's Board or attended the critical GPCC Board meetings relating to the restructuring proposals.

31. AMOT also had no knowledge of any alleged breaches of fiduciary duty by the other parties involved in the restructuring plan.

32. AMOT was not a substantial participant in preparing or consummating the 1975 restructuring.

D. THIRD AND FOURTH CLAIMS (GPCC)

33. In 1975, UPCM was a controlling shareholder in GPCC, owning 39 percent of the common stock and two-thirds of the preferred stock. Therefore, GPCC owed no fiduciary duties to UPCM in 1975.

34. GPCC neither induced nor aided and abetted alleged breaches of fiduciary duties by third parties in 1975.

E. FIFTH, SIXTH AND TENTH CLAIMS (GPI, PPI)

35. GPI was formed by Morgan and Fidelity pursuant to the 1975 restructuring of GPCC to act as their agent for the purpose of receiving an assignment of the Lease (Resort Area) and Lease (Cresent Ridge) between UPCM and GPCC.

36. GPI was not assigned an interest under the Lease (Deer Valley).

37. GPI leased back the assigned ski run leases to GPCC in return for payment of a certain percentage of the ski lift revenues collected each year.

38. PPI was formed by Morgan and Fidelity to act as their agent for the purpose of receiving an assignment of certain ski resort properties being purchased from UPCM by GPCC under the Land Purchase Agreement.

39. PPI was not assigned any interest under the UPCM/GPCC ski run leases or the Lease (Deer Valley).

40. PPI leased back the assigned properties to GPCC in return for payment of a certain percentage of the ski lift revenues collected each year.

41. UPCM expressly consented to the assignments of the ski run leases and ski properties to GPI and PPI.

42. UPCM expressly agreed to look solely to GPCC (and not to GPI or PPI) for performance of the underlying lease and purchase obligations.

43. UPCM is suing GPI and PPI for alleged breaches of the ski run leases by GPCC. The factual bases upon which GPI and PPI relied in seeking dismissal of plaintiff's Fifth, Sixth and Tenth Claims for Relief against them in the Amended Complaint were not rebutted by UPCM.

F. THIRD, FOURTH, FIFTH, SIXTH, NINTH, TENTH
AND TWELFTH CLAIMS (ROYAL STREET)

44. As the result of the restructure of GPCC in 1975, Royal Street Land Company (Land) acquired, with UPCM approval, the following rights in the 1971 contracts between GPCC and UPCM.

45. GPCC conveyed to Land GPCC's interest in the property located in Deer Valley which was subject to the Land Purchase Agreement with UPCM. Land's interest was assigned, with UPCM's consent, to Royal Street of Utah (RSU) and then to Deer Valley Resort Company (Deer Valley).

46. GPCC assigned an undivided one-half of its rights under the Water Rights Purchase Agreement to Land.

47. GPCC assigned to Land the right to lease 1,834 acres for skiing purposes in an expanded Lease (Deer Valley). This Lease was amended on May 21, 1979 and July 31, 1980. Land's interest was then assigned, with UPCM's consent, to RSU and then to Deer Valley. The primary term of the lease runs until April 30, 1991 and may be extended at the option of Deer Valley for three 20-year periods.

G. 1981 AND 1982 ESTOPPEL CERTIFICATES
(WELLS FARGO/ROYAL STREET)

48. In 1981, $6.6 million of bonds (1981 Bonds) were issued for the benefit of Deer Valley and purchased by Wells

Fargo, and the proceeds were paid to or for the benefit of Deer Valley. Such 1981 Bonds are secured by the 1981 Mortgage (as identified in the Complaint in Intervention, paragraph 4a), under which Mortgage is pledged the entire real estate [including the land leased under the Lease (Deer Valley)] and personal property consisting of the operating ski resort known as "Deer Valley Resort".

49. UPCM gave Wells Fargo an Estoppel Certificate (1981 Estoppel Certificate) and a Consent and Agreement (1981 Consent and Agreement) to induce Wells Fargo to accept the 1981 Mortgage and as a stated "condition precedent" to the purchase of the 1981 Bonds.

50. Wells Fargo's purchase of the 1981 Bonds was made in reliance upon the affirmative assurances and rights given to it by UPCM in the 1981 Estoppel Certificate and the 1981 Consent and Agreement concerning the Lease (Deer Valley).

51. In 1982, $6,000,000 of bonds (1982 Bonds) were issued for the benefit of Deer Valley and purchased by Merrill Lynch Pierce Fenner & Smith Incorporated (Merrill Lynch), and the proceeds thereof were paid to or for the benefit of Deer Valley. A material inducement to Merrill Lynch's purchasing such bonds was Wells Fargo's issuance of a Letter of Credit (1982 Letter of Credit) in the amount of $6,742,500 as

collateral which, in addition to the Deer Valley Resort itself, secured the 1982 Bonds. The Letter of Credit was issued pursuant to a Letter of Credit Agreement (1982 Letter of Credit Agreement) entered into by Deer Valley with Wells Fargo as an integral part of the subject 1982 Bonds transaction. The 1982 Letter of Credit and Letter of Credit Agreement are secured by the 1982 Mortgage (as identified in the Complaint in Intervention, paragraph 4b). The Deer Valley Resort is pledged under the 1982 Mortgage.

52. As a part of the 1982 Bonds transaction, for the purpose of providing Wells Fargo the same condition precedent, affirmative assurances and rights concerning the Lease (Deer Valley), UPCM executed and delivered to Wells Fargo an Estoppel Certificate (1982 Estoppel Certificate) which is identical in all material respects to that provided in 1981; and gave Wells Fargo a Consent and Agreement (1982 Consent and Agreement) likewise identical in all material respects to the 1981 Consent and Agreement.

53. Wells Fargo's extension of credit in connection with the 1982 Bonds transaction was made in reliance upon the assurances and rights under the 1982 Estoppel Certificate and the 1982 Consent and Agreement concerning the Lease (Deer Valley).

54. Wells Fargo has also provided Deer Valley with a revolving Line of Credit (Line of Credit) of approximately $4.5 million in principal amount, which Line of Credit is secured by various parcels of real property that are contiguous to and/or in the immediate vicinity of the Deer Valley Resort (Line of Credit Collateral Property), the value of which parcels is dependant upon Deer Valley's continuing as the operator of the Deer Valley Resort as a ski resort.

H. RESCISSION OF THE 1975 AGREEMENTS SOUGHT BY THE THIRD AND FOURTH CLAIMS (AMOT, GPCC, ROYAL STREET, MORGAN, FIDELITY)

55. UPCM does not seek to rescind the Royal Street Defendants' interests under the Land Purchase Agreement or seek the return of any land parcels already released to Royal Street or GPCC. Royal Street has received all land parcels to which it is entitled.

56. As of May 10, 1988 Land had received deeds to all of its parcels under the Land Purchase Agreement.

57. UPCM is estopped from asserting rescission or reformation of the 1975 agreements because UPCM continued to accept the benefits and performance of the agreements both before and after its claims for rescission and reformation were filed.

58. For example, after the original Complaint was filed in May, 1986, UPCM continued to accept payments under the

Lease (Resort Area) and Lease (Deer Valley) through November 7, 1989, as well as under other Resort Agreements, and to authorize the release of parcels under the Land Purchase Agreement.

I. INSTRUMENTS OF TITLE IN ESCROW

59. Title to the water sold to and paid for by GPCC and Royal Street under the Water Rights Purchase Agreement remains in escrow as do certain instruments of title paid for under the Land Purchase Agreement.

J. THE FIFTH, SIXTH, EIGHTH, NINTH AND TENTH CLAIMS ALLEGING CONTRACT DEFAULTS (GPCC, ROYAL STREET, GPI, PPI)

60. GPCC and Royal Street have made payment in full under the Land Purchase Agreement and Water Rights Purchase Agreement, curing any alleged defaults pursuant to the terms and conditions of these agreements. UPCM does not allege that GPCC or Royal Street has committed any defaults under the Land Purchase Agreement.

61. UPCM has waived and is estopped from asserting all contractual defaults alleged to have occurred prior to August, 1985, and all alleged continuing defaults alleged to have begun prior to that time, based on statements in its annual reports that GPCC and Royal Street were current on all

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agreements, and its certifications to the escrow agent that GPCC and Royal Street had paid all amounts of lift revenue that were owed.

62. There was no concealment of alleged GPCC contractual defaults from UPCM, because UPCM had one or more representatives on GPCC's Board until August, 1985 pursuant to paragraph 17 of the Lease (Resort Area) as amended.

K. SEVENTH CLAIM (GPCC)

63. Regarding the Seventh Claim for trespass against GPCC, the sale of the Town Lift property to Sweeney never occurred, and his option to purchase the property expired.

64. Prior to August, 1985, UPCM gave its written and verbal consent to GPCC to use the rest of the land which involves the trespass allegations.

II. CONCLUSIONS OF LAW

1. No genuine issues of material fact exist regarding any of the defendants' and intervenors' motions to dismiss or for summary judgment. All defendants and intervenor are entitled to summary judgment as a matter of law.

A. THE STATUTE OF LIMITATIONS ON THE THIRD AND FOURTH CLAIMS (AMOT, GPCC, ROYAL STREET, MORGAN, FIDELITY)

2. In 1975, UPCM, through three independent directors and several shareholders, knew or should have known

of any alleged wrongdoing in connection with the 1975 restructuring plan and the execution of numerous leases and agreements relating to the 1975 restructuring plan and Resort Agreements. Accordingly, there is no basis for tolling the statutes of limitations applicable to the claims arising from the restructuring, which statutes began to run in 1975.

3. The Third and Fourth Claims against GPCC, Royal Street, Morgan and Fidelity, for breach of fiduciary duty or inducing or aiding and abetting breach of fiduciary duty, and against AMOT, for inducing or aiding and abetting breach of fiduciary duty, are barred by the four-year statute of limitations contained in U.C.A. 78-12-25(3).

B. THIRD AND FOURTH CLAIMS (AMOT)

4. The only duties owed by AMOT Board Chairman, Mr. Badami, in 1975, were to AMOT's shareholders. UPCM shareholders had no basis to rely on opinions expressed by Mr. Badami at the October 7, 1975 meeting.

5. The Third and Fourth Claims in the Amended Complaint do not state a cause of action against defendant AMOT.

C. THIRD AND FOURTH CLAIMS (GPCC)

6. The Third and Fourth Claims fail to state a cause of action against GPCC for inducing, aiding or abetting, or for breach of fiduciary duty.

D. RESCISSION OF THE 1975 AGREEMENTS SOUGHT BY THE THIRD AND FOURTH CLAIMS (AMOT, GPCC, ROYAL STREET, MORGAN, FIDELITY)

7. The Third and Fourth Claims against GPCC, Royal Street, Morgan, Fidelity and AMOT are also barred to the extent they seek to rescind or reform the Resort Agreements, because of UPCM's continued acceptance of benefits and performance of the agreements both before and after claims for reformation and recission were filed, and because of payment in full under the Land Purchase Agreement and Water Rights Purchase Agreement by GPCC and Royal Street.

E. THE FIFTH, SIXTH, EIGHTH, NINTH AND TENTH CLAIMS ALLEGING CONTRACT DEFAULTS (GPCC, ROYAL STREET, GPI, PPI)

8. All allegations of contractual defaults applicable to the claims against GPCC, Royal Street, GPI or PPI in the Fifth, Sixth, Eighth, Ninth or Tenth Claims for Relief and which are alleged to have occurred prior to May 8, 1980, are precluded by the six-year statute of limitations, U.C.A. § 78-12-23(2), and all new allegations of default alleged in the Amended Complaint to have occurred prior to June 20, 1982 are precluded for the same reason. There is no basis for tolling this statute of limitations.

9. All alleged contractual defaults applicable to the claims against GPCC, Royal Street, GPI or PPI, in the Fifth, Sixth, Eighth, Ninth or Tenth Claims for Relief either are not defaults according to the terms of the Resort

Agreements, or have been performed, cured or waived. Alternatively, these alleged defaults are not material defaults, are not the subject of adequate notice required by the Resort Agreements and applicable law governing contractual forfeiture, are subject to the terms of the judicial ascertainment provisions of the Resort Agreements allowing cure after any final judgment determining defaults, or are subject to an adequate remedy in damages, and, thus, termination or forfeiture of these agreements is not permitted. The Court reserves for further determination the issue of whether UPCM has a claim for damages against GPCC based upon defaults under the Lease (Resort Area) alleged in paragraph 116(e)(ii) of the Amended Complaint.

10. To the extent the Fifth, Sixth, Eighth, Ninth or Tenth Claims against GPCC, Royal Street, GPI or PPI, are based on alleged breaches of the Land Purchase Agreement or Water Rights Purchase Agreement, these claims also must be dismissed based on payment in full under these agreements by GPCC and Royal Street.

F. FIFTH, SIXTH, TENTH AND ELEVENTH CLAIMS (GPI, PPI, MORGAN, FIDELITY)

11. Because UPCM's claims that would provide a basis for contract termination or other equitable relief are being

dismissed, the Eleventh Claim for Relief against GPI, PPI, Morgan and Fidelity must also be dismissed as a matter of law.

12. PPI was not assigned any interest under any of the UPCM/GPCC ski run leases. Therefore, UPCM's Fifth and Sixth Claims for Relief fail to state a claim against PPI.

13. GPI was not assigned an interest under the Lease (Deer Valley). Therefore, UPCM's Sixth Claim for Relief fails to state a claim against GPI.

14. UPCM expressly consented to the assignments of the GPCC ski run leases to GPI, thus limiting its right to recover, for any alleged breach, only against GPCC.

15. UPCM expressly agreed it would not look to any assignee for performance under the agreements. Therefore, UPCM's Fifth Claim for Relief fails to state a claim against GPI.

16. Any alleged duty of good faith arising out of the ski run leases and the property purchases is a contractual duty, and UPCM's express consent to the assignment of the GPCC ski run leases to GPI and the property purchases to PPI, and its limitation of its right to recover to GPCC, bars UPCM from recovering from PPI and GPI for any breach of that duty by GPCC. Therefore, UPCM's Tenth Claim for Relief fails to state a claim against PPI and GPI.

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G. THIRD, FOURTH, FIFTH, SIXTH, TENTH AND TWELFTH CLAIMS (WELLS FARGO/ROYAL STREET)

17. The doctrine of Equitable Estoppel precludes UPCM from asserting legal and equitable claims against Wells Fargo/Royal Street because UPCM negligently or intentionally made representations which Wells Fargo reasonably and justifiably relied on. UPCM is now estopped from pursuing any claims against Wells Fargo/Royal Street which are inconsistent with the plain language of the Estoppel Certificates and Consent and Agreement documents.

18. If UPCM did not knowingly and willingly make the statements in the Estoppel Certificates, it was negligent in executing the Certificates, to the detrimental reliance of Wells Fargo.

19. Having given the two Estoppel Certificates in 1981 and 1982, expressly stating there were no defaults under the Lease (Deer Valley), and having given the two Consent and Agreement papers, which were silent regarding the Water Rights and Land Purchase Agreements, UPCM is bound by what the documents stated or omitted to state, irrespective of whether said silence was intentional or negligent, regarding the Lease (Deer Valley), the Water Rights and Land Purchase Agreements, and any other property rights necessary to the ownership and

operation of the Deer Valley Resort by Royal Street. UPCM is equitably estopped and has waived all of the claims for contract termination, forfeiture, rescission, reformation and declaratory relief sought against Royal Street in the Third, Fourth, Fifth, Sixth, Tenth or Twelfth Claims for Relief in the Amended Complaint.

H. INSTRUMENTS OF TITLE IN ESCROW

20. All remaining unreleased instruments of title, deposited in escrow under either the Land Purchase Agreement or Water Rights Purchase Agreement, should be released from escrow by the escrow officer, defendant First Security Bank of Utah, N.A. The escrow agent should also release funds held in escrow to the party to which they are owed, including UPCM, GPI and PPI. First Security shall release these instruments as follows:

a. To GPCC:

(i) Original Conveyance covering resort facilities dated October 11, 1975, identified as document (dd) in the Substituted Escrow Agreement dated October 11, 1975 ("Substituted Escrow Agreement").

(ii) Original Special Warranty Deed (from UPCM to GPCC) covering Parcel 18 dated October 11, 1975, identified as document (ee) in the Substituted Escrow Agreement.

(iii) Special Warranty Deeds to any other parcels of the Development Properties (as that term is used in the Substituted Escrow Agreement), not previously delivered, including the Original Special Warranty Deed (from UPCM to GPCC) covering Parcel 2E dated October 11, 1975, identified as document (j) in the Substituted Escrow Agreement (if not already delivered), and any undelivered Original Special Warranty Deed (from UPCM to GPCC) covering Parcel 7-2B. Further, UPCM is hereby ordered to deliver to GPCC any and all policies of title insurance required to be delivered under the provisions of the Land Purchase Agreement as amended.

(iv) Original Conveyance dated October 11, 1975 covering water rights purchased under the Water Rights Purchase Agreement as Amended, identified as document (ff) in the Substituted Escrow Agreement.

(v) Original Lease (Crescent Ridge) dated May 1, 1975 and identified as document (e) in the Substituted Escrow Agreement.

b. <u>To Royal Street Land Co./Deer Valley Resort Co.</u>:

Original Conveyance dated October 14, 1975 covering an undivided one-half interest in water rights covered by the Water Rights Purchase Agreement

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as Amended, identified as document (xx) in the Substituted Escrow Agreement.

c. To PPI:

(i) Original Special Warranty Deed (from GPCC to PPI) covering Parcel 2E dated October 14, 1975, identified as document (ccc) in the Substituted Escrow Agreement.

(ii) Original Special Warranty Deed from GPCC to PPI covering Parcel 7-2B dated October 14, 1975, identified as document (ddd) in the Substituted Escrow Agreement.

(iii) Original Special Warranty Deed from GPCC to PPI covering Parcel 18 dated October 14, 1975, identified as document (eee) in the Substituted Escrow Agreement.

I. TWELFTH CLAIM (GPCC, ROYAL STREET)

21. Because UPCM's Twelfth Claim against GPCC and Royal Street for reformation of the 1971 Water Rights Purchase Agreement is based on events that occurred subsequent to the execution of the agreement, and events that occurred subsequent to the 1975 amendments to that agreement, that Claim fails to state a cause of action upon which reformation may be granted.

J. SEVENTH CLAIM (GPCC)

22. Pursuant to paragraph 14 of the Lease (Resort

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Area) and the Third Amendment thereto, the sale of the Town Lift property by UPCM was required in order for the Third Amendment to become effective. Because that sale never occurred, the Town Lift property remains part of the Lease (Resort Area), and this portion of UPCM's Seventh Claim for trespass against GPCC shall be dismissed.

23. The balance of the Seventh Claim for trespass against GPCC fails because of UPCM's contractual duties of cooperation with GPCC under Paragraph 19 of the Land Purchase Agreement, and because of UPCM's written and verbal consent to GPCC's use of the land in question.

III. ORDER

1. Defendants' and intevenor's motions to dismiss or for summary judgment are granted.

2. The Amended Complaint is dismissed with prejudice as to defendants AMOT, Morgan, Fidelity, GPI, PPI, Royal Street and intervenor Wells Fargo.

3. The Amended Complaint is also dismissed with prejudice as to defendant GPCC, except that the Court reserves for further determination the issue of whether UPCM has a claim for damages against GPCC based upon defaults under the Lease (Resort Area) alleged in paragraph 116(e)(ii) of the Amended Complaint.

4. Defendant First Security Bank of Utah, N.A., is ordered to release certain instruments of title from escrow forthwith, as follows:

a. To GPCC:

(i) Original Conveyance covering resort facilities dated October 11, 1975, identified as document (dd) in the Substituted Escrow Agreement dated October 11, 1975 ("Substituted Escrow Agreement").

(ii) Original Special Warranty Deed (from UPCM to GPCC) covering Parcel 18 dated October 11, 1975, identified as document (ee) in the Substituted Escrow Agreement.

(iii) Special Warranty Deeds to any other parcels of the Development Properties (as that term is used in the Substituted Escrow Agreement), not previously delivered, including the Original Special Warranty Deed (from UPCM to GPCC) covering Parcel 2E dated October 11, 1975, identified as document (j) in the Substituted Escrow Agreement (if not already delivered), and any undelivered Original Special Warranty Deed (from UPCM to GPCC) covering Parcel 7-2B. Further, UPCM is hereby ordered to deliver to

GPCC any and all policies of title insurance required to be delivered under the provisions of the Land Purchase Agreement as amended.

(iv) Original Conveyance dated October 11, 1975 covering water rights purchased under the Water Rights Purchase Agreement as Amended, identified as document (ff) in the Substituted Escrow Agreement.

(v) Original Lease (Crescent Ridge) dated May 1, 1975 and identified as document (e) in the Substituted Escrow Agreement.

b. <u>To Royal Street Land Co./Deer Valley Resort Co.</u>:

Original Conveyance dated October 14, 1975 covering an undivided one-half interest in water rights covered by the Water Rights Purchase Agreement as Amended, identified as document (xx) in the Substituted Escrow Agreement.

c. <u>To PPI</u>:

(i) Original Special Warranty Deed (from GPCC to PPI) covering Parcel 2E dated October 14, 1975, identified as document (ccc) in the Substituted Escrow Agreement.

(ii) Original Special Warranty Deed from GPCC to PPI covering Parcel 7-2B dated October 14, 1975, identified as document (ddd) in the Substituted Escrow Agreement.

(iii) Original Special Warranty Deed from GPCC to PPI covering Parcel 18 dated October 14, 1975, identified as document (eee) in the Substituted Escrow Agreement.

5. Defendant First Security Bank of Utah, N.A. is also ordered to release (at the same time the above instruments of title are released from escrow) funds held in escrow to the party to which they are owed, including UPCM, GPI and PPI.

DATED this 15 day of May, 1990.

BY THE COURT:

Pat B. Brian

PAT B. BRIAN
Third District Court Judge

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MAILING CERTIFICATE

I hereby certify that, on the 7th day of May, 1990, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS OR FOR SUMMARY JUDGMENT to the following:

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ADDENDUM C

78-12-25. Within four years.

Within four years:

(1) An action upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.

(2) A claim for relief or a cause of action under the following sections of Chapter 6, Title 25, the Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;

(b) Subsection 25-6-5(1)(b); or

(c) Subsection 25-6-6(1).

(3) An action for relief not otherwise provided for by law.

History: L. 1951, ch. 58, § 1; C. 1943, upp., 104-12-25; L. 1988, ch. 59, § 14.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, inserted Subsection (2); redesignated former Subsection (2) as Subsection (3); and made minor stylistic changes in Subsection (1).

ADDENDUM D

78-12-27. Action against corporate stockholders or directors.

Actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created, by law must be brought within three years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability accrued, and in case of actions against stockholders of a bank pursuant to levy of assessment to collect their statutory liability, such actions must be brought within three years after the levy of the assessment.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-27.

Cross-References. — Corporations generally, Title 16.

Liability of bank stockholders, Utah Const., Art. XII, Sec. 18.

Stock ownership by banks, § 7-3-21.

ADDENDUM E

Rule 12. Defenses and objections.

(a) **When presented.** A defendant shall serve his answer within twenty days after the service of the summons and complaint is complete unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) **How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56

(c) **Motion for judgment on the pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56

(d) **Preliminary hearings.** The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial

(e) **Motion for more definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading The motion shall point out the defects complained of and the details desired If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just

(f) **Motion to strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter

(g) **Consolidation of defenses.** A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule

(h) **Waiver of defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) **Pleading after denial of a motion.** The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion

(j) **Security for costs of a nonresident plaintiff.** When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a $300 00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff No security shall be required of any officer, instrumentality, or agency of the United States

(k) **Effect of failure to file undertaking.** If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall upon motion of the defendant enter an order dismissing the

ADDENDUM F

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

ADDENDUM G

e instituted to reverse or modify it in respect The appellees filed their re it for a stay thus acknowledging the lity of the decree and agreeing to its is It follows that both parties are bound eby and the appellees are estopped by recitals of that decree from pleading it ar to the prosecution of this suit After dgment or decree in rem a party to the rd is estopped from asserting any claim rary to the facts determined thereby he orders made therein Rector v Rot 3 Neb 171 McHugh v Smiley 17 Neb 626 20 N W 296 24 N W 277 Spitley rost (C C) 15 Fed 304 South Omaha ber Co v Central Inv Co 32 Neb 529, W 429

may be conceded that the decree was neous and that if proceedings had been n to reverse or modify it in any man such proceedings would have been sus d But it cannot be said that the de was void The court had jurisdiction ie subject matter and the parties to that and its decree, even if erroneous, is ing alike upon all of them In the ap tion of the principle of res judicata is no difference between courts of law courts of equity When an issue of fact f law has been adjudicated upon the ts in either tribunal it cannot be again ited in another Black on Judgments 2, sec 518 A decree of a court of eq whenever the parties to a suit and the ect of the controversy between them within its jurisdiction is as binding as d be the judgment of a court of law the parties and their interests regu within its cognizance Black on Judg s sec 517 By the terms of the decree is made subject to the lien of the $1 000 gage which is sought to be foreclosed is action Its effect was to preserve the of the mortgage and authorize its sub ent foreclosure The matter was thus u out of the general rule above mention It follows that the court erred in finding the former foreclosure was a bar to the ecution of this suit and in dismissing appellant's cause of action In any t under the facts in this case as dis d by the record the appellant was en l to a foreclosure of its mortgage for balance due thereon

e therefore recommend that the decree he district court be reversed and the e remanded, with instructions to the dis court to render a decree of foreclosure ayed for in the appellant's petition.

DHAM and POUND, CC concur

IR CURIAM The conclusions reached ie Commissioners are approved and it aring that the adoption of the recom lations made will result in a right deci of the cause, it is ordered that the de of the district court be reversed, and the cause remanded with directions to the district court to enter a decree of foreclosure in favor of the appellant.

HOME FIRE INS CO v BARBER et al

(Supreme Court of Nebraska Feb 17 1903)

CORPORATIONS — MISMANAGEMENT — STOCK HOLDERS—RIGHTS—CORPORATE ENTITY—EQ UITABLE RIGHTS — CONTRACT OF EMPLOY MENT—CONTINUATION—PRESUMPTION

1 Subsequent stockholders have no standing as a general rule to attack prior mismanage ment of the corporation

2 Such a stockholder ought not to be allow ed to sue unless the mismanagement or its effects continue and are injurious to him or it affects him specially and peculiarly in some other manner

3 Stockholders who have acquired their shares and their interest in the corporation from the alleged wrongdoers and through the prior mismanagement have no standing to complain thereof

4 Stockholders as such have no title to the corporate property which they may convey or incumber in their own name, but this is only another way of saying that the corporation must act through its proper agents and in the prescribed way

5 Where a corporation is proceeding at law or where it is asserting a title to property or the title to property is involved the corpora tion is regarded as a person separate and dis tinct from its stockholders or any or all of them

6 But where it is proceeding in equity to as sert rights of an equitable nature or is seek ing relief upon rules or principles of equity the court of equity will not forget that the stock holders are the real and substantial bene ficiaries of a recovery and if the stockholders have no standing in equity and are not equita bly entitled to the remedy sought to be en forced by the corporation in their behalf and for their advantage the corporation will not be permitted to recover

7 The proposition announced in the fourth paragraph of the syllabus in Fitzgerald v Fitz gerald & Mallory Construction Co 59 N W 838 41 Neb 374 was in effect if not express ly retracted on rehearing in Fitzgerald v Fitz gerald & Mallory Construction Co 62 N W 899 44 Neb 473 and is disapproved

8 A plaintiff must recover on the strength of his own case not on the weakness of the defendant s case It is his right not the de fendant s wrongdoing that is the basis of re covery

9 Where service under a contract of em ployment for a fixed period continues after such period has expired it is presumed to be under the same contract but this presumption must yield to evidence showing a change of terms

10 The general manager of a corporation aft er expiration of a contract fixing his salary at $5 000 per annum continued in the same em ployment without any new agreement and afterwards voluntarily reduced his salary to $3 000 per annum drawing it from month to month thereafter on that basis for many years, until he gave up the office After the original contract no action was taken by the directors with reference to his salary, but the evidence that he took the less sum from time to time in full payment was clear and convincing *Held* that a judgment for back salary at the rate of $2 000 per annum could not be sustained

(Syllabus by the Court)

Commissioners opinion Department No. 2 Appeal from district court, Douglas coun ty, Keysor, Judge.

Action by the Home Fire Insurance Com pany against Charles J Barber and others From the judgment defendant Barber ap peals and certain other parties bring cross appeals Reversed

Byron G Burbank and Halleck F Rose, for plaintiff W W Morsman and V O Strickler for defendant Barber

POUND, C The plaintiff is an insurance company organized in 1884 with a capital stock of $100 000, divided into 1 000 shares of $100 each Its business is conducted by a board of directors a finance committee an ex ecutive committee, and certain other officers including a secretary and general manager It appears that the secretary and general manager, at least down to December 1899 was at all times intrusted with the active management and control of the company s affairs and the president and the remaining officers appear to have given very little if any, attention thereto The appellant and principal defendant Charles J Barber was one of the original incorporators of the com pany, and was a stockholder therein from its organization until December 2 1899 During that period he was secretary and general manager one of the directors and a member of the executive committee His codefend ants, Lovett Woodman and Reynolds were also original incorporators and stockholders and from time to time from its organization until December 2 1899 were directors and members of the executive and finance com mittees On December 1899 the defendant Barber entered into a contract with one Funkhouser whereby he agreed to sell to said Funkhouser all of the shares of the cap ital stock of said company except 2 shares which he was to obtain if possible and to procure the resignation of all the officers and a majority of the directors He also agreed not to engage in the insurance business di rectly or indirectly for a period of three years By the terms of the contract he was to furnish to Funkhouser a true and complete statement of all the assets and liabilities of the company, and if, upon investigation the statement of assets and liabilities proved to be correct and satisfactory to Funkhouser the latter was to pay the sum of $75 000 for said shares, less $200 for the two shares above mentioned in case they could not be obtained and a further sum of $40 000 as a bonus for obtaining all of the shares of stock and for procuring the resignation of the offi cers, relinquishing his control of the com pany, and agreeing not to engage further in the business of insurance On December 2 1899 pursuant to said contract the defend ant Barber delivered to said Funkhouser all of the shares of the capital stock of said company, except 8 He also delivered an op tion contract for 6 of the remaining shares and subsequently procured and delivered the other 2 In payment therefor he received the sum of $94 880 60 in cash and $20,619 40 in assets of the company—namely $12 350 of collateral loans which he had agreed to accept at the time when the contract of sale was made and certain other assets amount ing to $8 269 40 which Funkhouser had re fused to accept at the time when the list of assets was under consideration Accordingly the shares of stock were transferred on the books of the company under the direction of Funkhouser to himself and certain others his associates in the transaction and he and his said associates became thereupon and now are the only stockholders in the com pany None of them had held stock therein theretofore At the same time pursuant to the contract the defendant Barber resigned his office and procured the resignation of the defendants Reynolds Woodman and Lovett and of the other principal officers and direct ors of the company and a new board of di rectors was elected and new officers took charge On November 20 1899 evidently in contemplation of a transfer of all his inter est in the corporation the defendant Barber drew out $2 200 of the company s moneys upon a claim of unpaid salary Subsequent to the change in management of the com pany this was discovered and a controversy arose between Barber and the new manage ment with reference thereto as a result of which suit was brought by the company to recover said sum Thereupon Barber made a counterclaim for some $10 000 of salary alleged to be due him and not withdrawn and as a result of examination and investi gation of the company s books with refer ence to this claim certain irregularities and mismanagement came to light which were set forth in an amended petition and fur nished the principal points of controversy in the case as finally tried

Thus there are two branches to the case Upon the one hand a suit by the corporation to recover the money taken out by Barber as back salary just prior to the time he sold his stock and certain other moneys which at various times he is alleged to have appro priated wrongfully to his own use and on the other hand a suit to recover for Barber s mismanagement and for profits made by him through the use of the company s money at a time when he stood in a fiduciary relation thereto The principal mismanagement con sisted in borrowing funds of the company to purchase its stock and in making a profit out of the purchase of the stock and the divi dends accruing thereon At the time the stock was bought with money borrowed from the company it was worth about $55 per share But seven years later when the de fendant Barber sold out his interest in the company it had come to be worth $115 per share During that time dividends had ac crued in considerable amounts and had been paid to and received by Barber The decree compels Barber to account for the profits and for the dividends on the ground that the loan of the company s funds and the use of those funds in purchase of the stock was unauthorized and that the profits and the dividends belonged in equity to the company. Upon the issue as to salary, the court found that Barber was entitled to recover for back salary, as claimed, and applied the amount found to be due him thereon upon the amounts found due the company by reason of his mismanagement.

The facts with reference to the mismanagement as found by the court are substantially these. In January 1892 and for some time prior to that date, the stockholders of the company were divided into two factions. The one consisted of the defendants Barber, Lovett, Reynolds and Woodman who held 237 shares, and some other stockholders not sufficient, however, to constitute a majority. The other faction was controlled by one Hamilton, and held in the aggregate 507 shares. As the controversy became acute the Hamilton faction required the Barber faction to purchase their 507 shares of stock or else to submit to the election of a board of directors who would choose a new secretary and general manager and entirely alter the policy and management of the company. It appears that Barber and his associates were experienced insurance men while Hamilton and his faction were not and the court has found that Barber, Lovett, Woodman and Reynolds believed it to be for the best interests of the company, as well as for their own interest, that the company should be managed by persons of experience in the business. Accordingly they agreed among themselves to purchase the 507 shares and thus preserve control of the company. For that purpose they agreed also to procure money temporarily by borrowing of banks on their own notes, paying said notes with money which they could borrow from the company as soon as they could obtain control thereof, unless in the meantime they were able to sell enough of the shares purchased to pay off their notes or to pay them off by the sale of other property. In pursuance of this design, they borrowed the necessary funds of banks, purchased the shares and distributed them among themselves, the majority going to the defendant Barber. A period of financial depression was imminent, and after the purchase it became impossible to dispose of the shares as the defendants had hoped so that it was necessary to borrow of the company in order to pay off their notes at the banks. Accordingly the defendants resorted to the company's funds, borrowing a portion upon real estate security, and another portion upon notes secured by pledge of the stock.

As to the money borrowed upon real estate security, the court has found that the loans were made in good faith, with bona fide intention of repaying them in full, principal and interest, that the security was fair and reasonable, that the loans were made according to the usual mode of business of the company, were entered upon the books in the regular way, were known to the officers, directors and stockholders of the company, were in large part included in the annual reports of the company, and have all been paid in full either by cash or conveyances of property to the company except the interest on a mortgage loan to the defendant Barber. The loans on collateral security on the contrary, were not carried on the books of the company openly in the name of the parties who obtained them. They were not such loans as the statute authorized the company to make and the court has found that they were not properly secured. The court has also found that it was agreed between the defendants Barber, Lovett, and Reynolds when these collateral loans were originally obtained from the company that they would pay no interest thereon, and that after a short time they ceased to pay any. These loans were kept standing on the books in one form or another until the sale of the stock to Funkhouser in December 1899 when the collateral loan account which consisted of these items was turned over to Barber as above stated. The court found on this point that the apportionment of the consideration which Funkhouser was to pay and did pay to Barber for all the shares of stock in the company, as provided for in the contract, whereby $75,000 was stated to be the consideration for the shares of stock, and the remaining $40,000 a bonus, was made after the sale was practically consummated, to enable Barber to buy in the shares of the company held by other stockholders for the purpose of selling and delivering them, and that the real value of the stock and the true consideration received therefor was not $75,000 but the full sum of $115,000. Upon this basis the court found that the portion of said 507 shares of stock which was covered by the collateral loans, namely 203⅛ shares, was at all times after the sale by Hamilton in equity the property of the company and that the company was entitled to recover the full consideration which Funkhouser paid Barber therefor, namely, $115 per share.

Another item of mismanagement grew out of a mortgage loan to the defendant Woodman. In 1886 Woodman and his wife borrowed $1,400 of the plaintiff upon a mortgage. In January, 1898, there was $1,600 due upon the loan and on that date Woodman assigned to Barber his half interest in 75 shares of the stock purchased from Hamilton and his associates which had been apportioned to Lovett and Woodman as partners. Thereupon the company released the mortgage and Barber charged the $1,600 on the books of the company as cash. This item was carried on the books in various ways until December 1, 1899, when Barber paid it. The court considered that this amounted to a use of $1,600 of the company's funds in the purchase of the stock, and that the profits on 37½ shares, amounting to $2,612.50, should be accounted for to the company.

A similar item grows out of the purchase by Barber from the plaintiff of 20 shares of stock, originally held by the wife of the defendant Reynolds. This stock was sold to the company on August 1, 1899, and applied on a mortgage of $2,700, given by her and her husband to the company. The court found that Barber purchased the stock of the company, giving his note for a portion, and carrying the remainder upon the books of the company by various devices until December 1, 1899, when the whole was paid. It held, therefore, that he was liable to the company for the profit on these shares.

A further item of mismanagement grows out of a mortgage for $2,600 executed by one Raff. In January, 1894, an installment of principal and a large amount of accrued interest and taxes had fallen due. At that time the mortgage was assigned by its then holder to the defendant Barber for about the sum of $1,300. The court has found that Barber knew at the time that foreclosure would be necessary, and immediately instituted a suit in his own name for that purpose. Pending a stay, on order of sale pursuant to decree in the foreclosure suit, Barber assigned the mortgage to the plaintiff company as collateral security for a note which he owed it, and afterwards drew out $2,500 of the company's money in payment therefor. Subsequently the foreclosure sale was confirmed, and a large deficiency judgment entered. This judgment was never assigned to the company, but, after receiving a master's deed in the foreclosure proceedings, he conveyed the property by warranty deed to the plaintiff. The court found that the company paid taxes amounting to nearly $1,200 and taking this into account, held that the total amount of the company's money used in the transaction was over $5,100. It found, further, that this was an improvident and unlawful investment, in case the mortgage was bought originally for the company, as Barber alleged, and that, if it was not so bought originally, the sale to the company pending stay in the foreclosure suit was a violation of his trust, so that in either event he did not act for the best interests of the company and upon reconveyance should account to it for said sum of $5,100.

The other items are of a different nature. In 1895 Barber, while secretary and manager of the company, drew two checks, for $1,500 each—one to the defendant Reynolds and the other to the defendant Lovett. These checks were indorsed and deposited by Barber in his personal account. Thereupon he drew his check in favor of the company for the aggregate sum, deposited it to the credit of the company, and credited said sum of $3,000 on collateral notes signed by himself and said defendants, as a payment thereon. These checks were issued in payment of alleged claims for services rendered by Lovett and Reynolds in preventing legislation hostile to the company and other similar matters, and the court has found that such claims were not bona fide and were barred by the statute of limitations and that the transaction was in effect a conversion of $3,000 of the company's money. It has also found that at various times the defendant collected sums amounting to $237.37 belonging to the company, for which he failed to account. We think that the item of interest on the mortgage loan above mentioned is to be put in the same category.

And here belongs also the claim for $2,200 of the company's funds withdrawn by Barber on November 20, 1899, on account of back salary. Upon the issues as to salary, the court found that in 1890 a contract was entered into between Barber and the company whereby he was to receive a certain salary for the remainder of that year and for the year 1891 and from January 1, 1892, to January 16, 1895, a salary at the rate of $5,000 per annum. The term of employment under the contract was for five years. Barber served, however, continuously from the inception of the contract until December 2, 1899, and after the expiration of the term provided no action of any kind was ever taken by the company by its board of directors or by any committee or officer other than Barber, with reference to the amount of salary. But in 1895, on account of general financial depression, it became necessary to reduce the salaries of all employés and at that time Barber voluntarily reduced his own salary to $3,000 per annum. The court finds that from that date he drew his salary from month to month substantially on the basis of such reduction until he terminated his connection with the company. The evidence tends to show that during the period from 1895 to 1899 he made repeated admissions that his salary was paid, that he made statements of the condition of the company from which it is evident he considered his salary was $3,000 per year, and that the statement of the assets and liabilities which he made to Funkhouser pursuant to his contract was made upon the same basis. The court found, however, that he was not estopped by his voluntary action but was entitled to receive salary at the rate of $5,000 per annum during the whole period from 1895 and that there was due him on account of undrawn salary the sum of $9,485.22.

Thus, as already indicated, this suit involves two distinct questions. The liability of the defendant Barber to account to the company as at present constituted for his mismanagement and unauthorized dealings with the company's funds prior to the sale of all the stock to Funkhouser and his associates is one question. His liability to the company for moneys and assets of the company withdrawn and converted to his own use is quite another question. Connected with this last question is his claim for unpaid salary.

We shall first address ourselves to the question of Barber's liability for mismanagement. Complaint is made of the findings of fact of the trial judge upon the several items with respect to which mismanagement is charged. The evidence on these points is very voluminous, and in some respects is conflicting. Much of it takes the form of expert testimony with reference to the company's books, and is made up of conclusions deduced by accountants from their examinations of the books and papers of the company, which are difficult to follow, and at times are somewhat conjectural. But upon review of the evidence we are satisfied that the findings of fact are accurate and complete, and are well sustained by competent and credible evidence. We have no disposition to interfere with any of them. Accepting these findings of fact, however, several important questions of law arise, with reference to which the decree rendered must be tested.

Counsel for appellant makes three points. The first is that the several transactions re-:ited amounted to loans of the company's noney to Barber, and that, as the money orrowed has been repaid, he and not the ompany is entitled to the profits. We can-not assent to this proposition. The use of he company's money amounted, as the court as found, to a speculation by one of the offi-ers in violation of his trust, which resulted a profit. Were this an ordinary case, we hink there can be no question that the cor-oration would be entitled to sue, or a stock-older on its behalf and for the benefit of all thers. But it is urged that this is not an rdinary case. None of the present stock-olders were owners of stock in the corpora-on at any time previous to December 2, 899. All of them acquired their interest in e corporation by and through the sale from arber to Funkhouser on that date. Ac-rdingly, the second point made by counsel is at as the defendant Barber came to own of the stock, and the present stockholders quired their stock through him, there was a erger in said defendant of all the claims ich the corporation or its stockholders ght have held against him, and such claims came extinguished thereby. We do not nk this point is well taken. The trial urt has found, upon conflicting evidence, t the defendant was never the owner of all stock in the corporation, but was only agent of some of those whose stock he cured and sold to the present stockholders. ere is ample evidence to show that this is e, and that as to several shares of stock had at no time any beneficial interest. third and most serious point is that a overy in the present case would be en-ly for the advantage and inure to the efit of the present stockholders. It would unt, in substance, to a recovery back by n of the purchase money which they paid defendant Barber for his stock, since the ey, when recovered for the corporation, would be for distribution among them—the sole stockholders of the company as now constituted.

This raises numerous and difficult questions. It must be determined whether the present stockholders, or any of them, are entitled to complain of the acts of the defendant and of his past management of the company; for, if any of them are so entitled, there can be no doubt of the right and duty of the corporation to maintain this suit. It would be maintainable in such a case, even though the wrongdoers continued to be stockholders and would share in the proceeds. 1 Morawetz, Private Corporations, § 294. We have, therefore, to consider first, how far, if at all, subsequent shareholders may complain of prior mismanagement of the corporation. Next we must consider how far subsequent shareholders may complain of mismanagement, when they hold through such mismanagement or have acquired their shares from persons who participated therein. The third question to be considered is whether the result of a recovery in this case would be inequitable, as permitting the present stockholders to recover back purchase money, or a portion thereof, for which they received full consideration, and to acquire shares worth $115 each at $55 per share, and, in addition thereto, recover and divide among themselves a further sum of $60 per share, imposed upon the defendant Barber for his delinquencies in matters which have in no way injured the present stockholders, or any of them, or their interests. Finally, assuming that, by reason of the foregoing propositions, the present stockholders are in no position to complain and have no standing in equity, may the court look beyond the corporation to the ultimate and substantial beneficiaries of a recovery, or is it bound to deal with the corporation as a separate person in all respects?

Sound reason and good authority sustain the rule that a purchaser of stock cannot complain of the prior acts and management of the corporation. Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827; Dimpfel v. Ohio & M. R. Co., 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121; Taylor v. Holmes, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. Ed. 179; Southwest Natural Gas Co. v. Fayette Fuel-Gas Co., 145 Pa. 13, 23 Atl. 224; Alexander v. Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337; Clark v. American Coal Co., 86 Iowa, 436, 53 N. W. 291, 17 L. R. A. 557; United Electric Securities Co. v. Louisiana Electric Light Co. (C. C.) 68 Fed. 673; Venner v. Atchison, T. & S. F. R. Co. (C. C.) 28 Fed. 581; Heath v. Erie R. Co., 8 Blatchf. 347, Fed. Cas. No. 6,306; Dannmeyer v. Coleman (C. C.) 11 Fed. 97, 8 Sawy. 51; Pennsylvania Tack Works v. Sowers, 2 Walk. 416; 4 Thomp. Corp. § 4569. In Alexander v. Searcy, supra, the court says: "The weight of authority seems to be that a person who did not own stock at the time of the transac-

tions complained of cannot complain or bring a suit to have them declared illegal." In United Electric Securities Company v. Louisiana Electric Light Company, it is said: "As a general proposition, the purchaser of stock in a corporation is not allowed to attack the acts and management of the company prior to the acquisition of his stock; otherwise, we might have a case where stock duly represented in a corporation consented to and participated in bad management and waste, and, after reaping the benefits of such transactions, could be easily passed into the hands of a subsequent purchaser, who could make his harvest by appearing and contesting the very acts and conduct which his vendor had consented to." These remarks are not without application to the case at bar. The present shareholders are all subsequent purchasers. They obtained their stock through the defendant Barber. They hold a large number of their shares under a purchase from him and his associates through the very mismanagement now complained of. A majority of the remaining shares come directly from Barber and his associates in the wrongs upon which this suit is based. In other words, the present stockholders are contesting acts through which they get title to a large portion of their stock, and acts which those through whom they derived the greater part of the remainder could not have challenged because they participated therein, and, by contesting these acts, which did not injure any of the present stockholders in the least, are recovering back a large part of the purchase price of stock which was admittedly worth all that they paid for it. Such cases illustrate forcibly the wisdom of confining complaints of this kind to those who were stockholders at the time or their successors by operation of law.

The rule that a suit for mismanagement cannot be maintained by one who was not a stockholder at the time has been criticized as based on jurisdictional considerations peculiar to the federal courts and on obsolete common-law doctrines as to champerty and maintenance. 4 Thompson, Corporations, §§ 4569-4571; 1 Morawetz, Private Corporations, § 270. In our judgment it does not depend upon either. The federal equity rule, while designed in part to prevent collusive proceedings in fraud of the jurisdiction of those courts, goes far beyond the requirements of such a purpose. If that were the sole purpose of the rule, it should go no further than to prevent such suits where the vendor of the stock was a citizen of the same state as the corporation. If the vendor and purchaser were citizens of the same state, and the vendor, an original stockholder, had never had the same citizenship as the corporation, no fraud on the jurisdiction of the court would be possible, and in such case, if recovery were proper and the purchaser's cause were meritorious, it would be highly unjust for the court to abrogate its jurisdiction. This consideration alone disposes of the criticism. The rule has its foundation in a sound and wholesome principle of equity, namely, that the rules worked out by chancellors in furtherance of right and justice shall not be used, because of their technical character, as rules to reach inequitable or unjust results. Resting on this basis, "the value and importance of the rule * * * are constantly manifested." Field, J., in Dimpfel v. Ohio & M. R. Co., 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121. The right of the stockholder to sue exists because of special injury to him for which otherwise he is without redress. If his interest is trifling, and the injury thereto of no consequence, he cannot sue to compel righting of wrongs to the corporation. McHenry v. New York, P. & O. R. Co. (C. C.) 22 Fed. 130; Albers v. Merchants' Exchange, 45 Mo. App. 206. Hence there is obvious reason for holding that one who held no stock at the time of the mismanagement ought not to be allowed to sue, unless the mismanagement or its effects continue and are injurious to him, or it affects him specially and peculiarly in some other manner. City of Chicago v. Cameron, 22 Ill. App. 91, on appeal 120 Ill. 447, 11 N. E. 899, is a case of the first type. Carson v. Iowa City Gaslight Co., 80 Iowa, 638, 45 N. W. 1068, is of the second type. Except in such cases, the purchaser ought to take things as he found them when he voluntarily acquired an interest. If he was defrauded in the purchase, he should sue the vendor. As to the corporation and its managers, so long as he is not injured in what he got when he purchased, and holds exactly what he got and in the condition in which he got it, there is no ground of complaint. Clark v. American Coal Co., 86 Iowa, 436, 53 N. W. 291, 17 L. R. A. 557.

The cases which hold that a subsequent stockholder may sue for mismanagement may be noticed briefly. Those commonly cited are: Ramsey v. Gould, 57 Barb. 398; Young v. Drake, 8 Hun, 61; Parsons v. Joseph, 92 Ala. 403, 8 South. 788; Winsor v. Bailey, 55 N. H. 218; Forrester v. Boston & M. Consolidated Silver Min. Co., 21 Mont. 544, 55 Pac. 229, 353. In Ramsey v. Gould, plaintiff, believing that there had been mismanagement, bought shares for the purpose of proceeding against the directors and officers and "bringing them to justice." The court permitted the suit upon the ground that plaintiff's motives were immaterial. But it assumed, without discussion, that he had an interest to vindicate, and had suffered some wrong, which is the real question on which such cases depend. Moreover, it is by no means clear that the motives behind a stockholder's suit are immaterial. Where stock is acquired for the purpose of bringing suit, it has been held that the complainant is a mere interloper, entitled to no consideration. Hawes v. Oakland, 104 U. S. 461, 26 L. Ed. 827; Moore v. Silver Valley ning Co 104 N C 534 10 S E 679, ngman v Rome W & O R Co 30 Hun Du Pont v Northern Pac R Co (C 18 Fed 467, 471 And stockholders suits brought in good faith in the interests of corporation have been dismissed on that und Beshoar v Chappell 6 Colo App 40 Pac 244 Belmont v Erie R Co, Barb 637 In Young v Drake the court ow Ramsey v Gould The further point nade that 'the plaintiff acquired all the nts of the person of whom he purchased" course in a case where those of whom purchased had participated or acquiesced he mismanagement this view would pre- le the purchaser from suing And he ld not sue as being a bona fide purchaser gnorance of the disability attaching to vendor, because shares of stock are not otiable and the sale cannot pass greater nts than those possessed by the vendor rk v American Coal Co 86 Iowa 436, N W 291, 17 L R A 557, 4 Thompson porations p 3410 But it may be doubt whether a purchaser of stock buys or in ls to buy anything beyond the vendor s ient interest in the corporation and its ts His vendor's causes of action for injuries and rights to complain of past management are scarcely in contempla of the parties We must not suffer our- es to be deceived by speaking of causes ction of the corporation in this connec since causes of action of this character ng to the corporation for the benefit and he interest of its stockholders Parsons oseph and Winsor v Bailey adopt the r of Mr Morawetz that the rule announ by the federal courts is a rule of practice d on jurisdictional peculiarities of those ts and not of general application In ester v Mining Co the transaction was complete and still required ratification he stockholders The complainants al gh they bought after the acts were done stockholders while the matter was still iative, and had an undoubted right to fere to prevent its consummation ce what is said as to the point in ques is dictum only

ie fallacy in the view that one who has been injured by a transaction and is not ted thereby can acquire a right to sue quity to set it aside because he has ired the shares of the person injured, posed in such cases as Graham v La se & M R Co, 102 U S 148 26 L 106 and Hoffman v Bullock (C C) 34 248 The right to complain of such sactions is one which the stockholders ed may or may not exercise as they se Where such transactions are not ab ely void, they may, if they so elect, iesce and treat them as binding The etion whether to sue to set them aside acquiesce in and agree to them is in ble of transfer If the new stockhold injured there is another question In that case he also has a power of proceeding or remaining inactive as he may prefer Where he is not injured he can take no advantage of the power which was in his vendor and the latter did not care to exer cise In Graham v LaCrosse & M R Co, supra the point was urged which is so often made in connection with suits by subsequent stockholders and upon which Mr Morawetz bases his statement that such stockholders should be allowed to sue Field J says "But it is contended that this is a case where the debtor corporation was defrauded of its property and that, as the company had a right of proceeding for its recovery any of its judgment and execution creditors have an equal right that it is a property right and one that inures to the benefit of creditors Conceding that as to creditors who were such when the fraudulent procure ment of the debtor s property occurred * * * the question still remains whether * * * subsequent creditors have such an interest that they can reach the property for the satisfaction of their debts We doubt whether any case going as far as this can be found * * * It seems clear that sub sequent creditors have no better right than subsequent purchasers to question a previ ous transaction in which the debtor's prop erty was obtained from him by fraud, which he has acquiesced in and which he has man ifested no desire to disturb Yet in such case subsequent purchasers have no such right.' Hence, upon review of the author ities and the principles on which they ap pear to proceed notwithstanding the posi tion of some of the text writers the sounder doctrine sustained by the better and more numerous adjudications appears to be that subsequent stockholders have no standing, as a general rule to attack prior misman agement of the corporation

It appears to be well settled also that stockholders who have acquired their shares and their interest in the corporation from the alleged wrongdoers and through the prior mismanagement have no standing to complain thereof Brown v Duluth M & N R Co (C C) 53 Fed 889, Matter of Application of Syracuse C & N Y R Co 91 N Y 1, Schilling & Schneider Brewing Co v Schneider 110 Mo 83, 19 S W 67, Langdon v Fogg 14 Abb N C 435 Par sons v Hayes 18 Jones & S 29, Hollins v St Paul M & M R Co (Sup) 9 N Y Supp 909, Clark v American Coal Co 86 Iowa 436 53 N W 291 17 L R A 557, 4 Thompson, Corporations p 3410, Cook, Corporations §§ 40 736, note If a stock holder's predecessor in title has acquiesced in a course of mismanagement, it has even been held that he cannot maintain a suit to restrain its continuance Trimble v Am Sugar Refining Co 61 N J Eq 340, 48 Atl 912 In Thompson Corporations, supra, the learned author says But as share certifi cates do not, under any theory, rise to the

grade of strictly negotiable paper, it should follow, and especially in regard of the trans fer of any litigious rights which may attach to them, that their holder cannot by sell ing them to another transfer to that other any better litigious rights inhering in them, than he himself possesses If therefore he has by his conduct as a shareholder estop ped himself from maintaining a suit in equi ty to undo corporate action, this estoppel will attend the shares in the hands of his vendee" In consequence it would make no great difference in the case at bar as to the standing of the present shareholders of the company in a court of equity, if we held that subsequent shareholders could attack prior mismanagement The present share holders hold 260 shares through a purchase from Barber, who acquired title through the acts complained of, and the money which they paid for those very shares, which they hold through such purchase, is now claimed to belong to the corporation, and is sought to be recovered from their vendor Nor is this all The greater part of the remain ing shares were held by Barber and his as sociates when the alleged wrongs were com mitted, and are now held by the present stockholders under a purchase from Barber To allow them to open up these transactions is to allow them to go counter to their own title to a large part of the stock, and to assert rights and claims which their vendor could never have asserted and this too as to past transactions which have no present effect upon the value of their stock and do not continue to be felt in any way in the corporate management

There is another and still stronger reason why the present stockholders have no stand ing in a court of equity to complain of the transactions on which this suit is based To permit them to recover, under the circum stances of the case at bar, would be highly inequitable It would be to give them mon eys to which they have no just title or claim whatever, and enable them to speculate upon wrongs done to others with which they have no concern It would enable them to recov er back a large part of the purchase money they paid and agreed to pay for the stock notwithstanding the stock was worth all that they paid for it, and notwithstanding they obtained and now retain all that they bar gained for So long as they received all that was contracted for there is no equity in allowing them to recover back a considera ble portion of what they paid merely be- cause their vendor had previously wronged some one else who could have obtained redress in the name of the corporation which they are now able to use This is especially manifest in respect to the dividends As Barber and his associates acquired shares by unauthorized borrowings of the company's money, and so held them in trust for the corporation, as representing all the then stockholders, in equity the dividends paid upon such shares doubtless were received impressed with the same trust. But who were the beneficiaries of that trust? Not the other stockholders only but Barber and his associates together with such remain ing stockholders Barber and his associates held most of the stock outside of the shares in question Instead of receiving all the dividends on those shares they should have received in equity the greater portion only Had a stockholder gone into equity at that time and recovered the dividends for the company they would simply have been for distribution among those who held the shares not subject to a trust for the com pany and Barber and his associates would still have been the heaviest beneficiaries For it is well settled that a recovery in such case inures to the benefit of all stockholders as well those who were wrongdoers as those who were innocent 4 Thompson Corpora tions § 4491 But after an entirely new set of stockholders have come in holding these shares under Barber and his associates and the remainder of the latter s shares under purchase from them to let them recover back these dividends is to let them reclaim over 50 per cent of the purchase money and recover from Barber moneys which in equity belonged to him when he took them The fact that a relatively small portion be longed to others cannot alter the uncon scionable character of such a recovery so long as the present stockholders are not those others and have no standing in equity as their representatives Recovery by or for the benefit of the present stockholders means to put it plainly that through the instru mentality of a court of equity they are to get shares worth by their own valuation $115 each for $55 each are to get back divi dends which never would have been payable to them in any event and were not bargained for when they bought and are to receive in addition to the shares worth $1 15 on the dollar 60 cents more on each dollar impos ed on Barber for his delinquencies Barber wronged the old stockholders His conduct in many respects was unconscionable and in defensible But his fellow stockholders were supine for many years They took no steps to investigate what he was doing or to protect or assert their rights Now third parties who bought all of Barber s shares including those which he held as a result of his wrongful manipulations seek to assert those rights and reap a profit thereby Because the inequita ble conduct of Barber shocks the conscience of the chancellor is no reason why he should give his conscience a further shock by allow ing Funkhouser and his associates to recover moneys to which they have no legal or eq uitable claim

Conceding then that all of the present stockholders are so circumstanced that no relief should be afforded them in a court of equity may the corporation recover notwith standing? We think not. Where a corpora tion is not asserting or endeavoring to protect a title to property, it can only maintain a suit in equity as the representative of its stockholders. If they have no standing in equity to entitle them to the relief sought for their benefit, they cannot obtain such relief through the corporation or in its own name. Arkansas River Land Town & Canal Co. v. Farmers' Loan & Trust Co., 13 Colo. 587, 22 Pac. 954; Des Moines Gas Co. v. West, 50 Iowa, 16; Schilling & Schneider Brewing Co. v. Schneider, 110 Mo. 83, 19 S. W. 67; Flagler Engraving Machine Co. v. Flagler (C. C.) 19 Fed. 468; Parsons v. Hayes, 14 Abb. N. C. 419; Langdon v. Fogg, 14 Abb. N. C. 435. It would be a reproach to courts of equity if this were not so. If a court of equity could not look behind the corporation to the shareholders, who are the real and substantial beneficiaries, and ascertain whether these ultimate beneficiaries of the relief it is asked to grant have any standing to demand it, the maxim that equity looks to the substance, and not the form, would be very much limited in its application. "It is the province and delight of equity to brush away mere forms of law." Post, J., in Fitzgerald v. Fitzgerald & Mallory Construction Company, 44 Neb. 463, 492, 62 N. W. 899. Nowhere is it more necessary for courts of equity to adhere steadfastly to this maxim, and avoid the danger of allowing their remedies to be abused, by penetrating all legal fictions and disguises, than in the complex relations growing out of corporate affairs. Accordingly, courts and text-writers have been in entire agreement that equity will look behind the corporate entity, and consider who are the real and substantial parties in interest, whenever it becomes necessary to do so to promote justice or obviate inequitable results. In 4 Thompson, Corporations, § 4479, the learned author says: "As a point of substance and sense the corporation consists of the aggregate body of its shareholders, it is obvious that in the most substantial sense the directors are trustees for the shareholders, and that, in any action to redress breaches of trust on the part of the directors, the shareholders are the real parties in interest." Again: "For the purpose of substantial right, though not for the convenience of legal procedure, the aggregate body of shareholders in a joint-stock company should be deemed the corporation." 1 Thompson, Corporations, § 17. Mr. Morawetz also writes very cogently to the same effect: "It is essential to a clear understanding of many branches of the law of corporations to bear in mind distinctly that the existence of a corporation independently of its shareholders is a fiction, and that the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being." 1 Morawetz, Private Corporations, § 1. "While a corporation may, from one point of view, be considered as an entity, without regard to the corporators who compose it, the fact remains self-evident that a corporation is not in reality a person or thing distinct from its constituent parts. The word 'corporation' is but a collective name for the corporators or members who compose an incorporated association." Id. In Moore v. Schoppert, 22 W. Va. 282, 290, the court say: "The relation between a corporation and its several members may, for all practical purposes, be treated as that of trustee and cestui que trust. In contemplation of law, the property and rights of an incorporated company belong to the united association acting in the corporate name, and not to the stockholders. The latter, however, are the real owners; and a technical trust thus arises in their favor, which will be protected and enforced by courts of equity."

This principle that in equity the corporation is regarded as a trustee for those who are the ultimate substantial beneficiaries of what is held and acquired in the corporate name finds many important illustrations in various departments of the law of corporations. Thus, it has been held that a sole stockholder may be treated in equity as the corporation, when the equities of a case so require. Swift v. Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336; 7 Thompson, Corporations, § 8403; 4 Thompson, Corporations, § 5097. The case of Swift v. Smith has been criticised, as we think with some reason, so far as it deals with the sole stockholder as if he had some title to the property. But so far as it sustains the proposition that between the corporation and the stockholder the latter is to be recognized as the real beneficiary, and consequently that equitable rights and remedies, the benefit whereof would inure solely *to the shareholder*, are to be regarded as exercised for him by the corporation, and not as something belonging to it independently, the decision is in accord with the authorities. It has also been applied frequently where acts have been done or assented to by the whole body of shareholders, and attempt has been made to evade liability by conjuring with the corporate name. 1 Morawetz, Private Corporations, § 262; Sheldon v. Eickemeyer, 90 N. Y. 607, 613; Hotel Co. v. Wade, 97 U. S. 13, 23, 24 L. Ed. 917.

Another case where this principle comes into play is to be seen in attempts to place property beyond the reach of creditors by fraudulent incorporations. In such cases courts do not hesitate to look behind the corporation to the real and substantial beneficiaries. First Nat'l Bank v. F. C. Trebein Co., 59 Ohio St. 316, 52 N. E. 834; Terhune v. Hackensack Savings Bank, 45 N. J. Eq. 344, 19 Atl. 377; Kellogg v. Douglas County Bank, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596; Lusk v. Riggs (Neb.) 91 N. W. 243. In First Nat'l Bank v. F. C. Trebein Co., the court say: "The fiction by which

an ideal legal entity is attributed to a duly formed incorporated company, existing separate and apart from the individuals composing it, is of such general utility and application as frequently to induce the belief that it must be universal, and be in all cases adhered to, although the greatest frauds may be perpetrated under the fiction as a shield. But modern cases, sustained by the best text writers, confine the fiction to the purposes for which it was adopted." It has likewise been applied to cases of estoppel. Thus Mr. Thompson says: "We may also conclude, from the premise that the body of stockholders are in substance the corporation, that estoppels are concurrent as between the stockholders and the corporation; in other words, that whatever will estop the stockholders will estop the corporation, and whatever will estop the corporation will estop the stockholders." 4 Thompson, Corporations, § 5269. But the commonest instance of application of this principle is in stockholders' suits for mismanagement. Ordinarily such suits are to be brought in the name of the corporation, at the instance of the corporate authorities. But where, for some reason, this course is not open, the stockholders injured will not be deprived of all remedy, but upon proper showing will be permitted to sue directly by joining the corporation as a defendant. The very basis of these suits is that "courts of equity recognize that the stockholders are ultimately the only beneficiaries." City of Chicago v. Cameron, 120 Ill. 447, 11 N. E. 899. Stockholders are allowed to sue, in order to obtain redress for such wrongs, "because in their effect and essential character they are wrongs to the individual shareholder, inflicted upon his corporate interests by means of the control over those interests secured through the corporate organization and management." Brewer v. Boston Theater, 104 Mass. 378, 395. See, also, State v. Holmes, 60 Neb. 39, 42, 82 N. W. 109. It is but another application of the same principle to hold that where no question of title is involved, but some equitable remedy is sought in the corporate name, depending purely upon the doctrines of a court of equity, the court, to prevent abuse and perversion of its doctrines and remedies, will look through the corporation to the real parties in interest, and, if those parties have no standing in equity, will refuse the remedy.

Cases of this kind must be differentiated sharply from those where the proceeding is at law, or where a question of title to the corporate property is involved. There is no question that stockholders, as such, have no title to the corporate property which they can convey or incumber in their own names. Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473; Wheelock v. Moulton, 15 Vt. 519; Smith v. Hurd, 12 Metc. (Mass.) 385, 46 Am. Dec. 690; Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706; Button v. Hoffman, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131; Spurlock v. Missouri Pac. R. Co., 90 Mo. 200, 2 S. W. 219. But this, in substance, is only another way of saying that the corporation must act through its proper agents and in the prescribed way. 4 Thompson, Corporations, § 4476. It is also true, for convenience of legal procedure and to avoid confusion, that restitution or redress, even where the injury has affected the interests of the stockholders, is to be sought primarily through the corporation. But this rule must always yield to the requirements of equity, and is cast aside in view of the fact that the stockholders are the real beneficiaries whenever the usual course is not open. Brewer v. Boston Theater, supra; 4 Thompson, Corporations, § 4477. Cases like the one at bar are obviously within the same reason. To permit persons to recover through the medium of a court of equity that to which they are not entitled, simply because the nominal recovery is by a distinct person through whom they receive the whole actual and substantial benefit, and that nominal person would, in ordinary cases, as representing beneficiaries having a right to recover, be entitled to relief, is perversion of equity. It turns principles meant to do justice into rules to be administered strictly without regard to the result. It is contrary to the very genius of equity. When the corporation comes into equity and seeks equitable relief, we ought to look at the substance of the proceeding, and, if the beneficiaries of the judgment sought have no standing in equity to recover, we ought not to become befogged by the fiction of corporate individuality, and apply the principles of equity to reach an inequitable result.

Hence, we think the rule to apply to such cases is this: Where a corporation is proceeding at law, or where it is asserting a title to property, or the title to property is involved, the corporation is regarded as a person separate and distinct from its stockholders, or any or all of them. But where it is proceeding in equity to assert rights of an equitable nature, or is seeking relief upon rules or principles of equity, the court of equity will not forget that the stockholders are the real and substantial beneficiaries of a recovery, and if the stockholders have no standing in equity, and are not equitably entitled to the remedy sought to be enforced by the corporation in their behalf and for their advantage, the corporation will not be permitted to recover. This rule finds many illustrations in the authorities.

In Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust Co., 13 Colo. 587, 22 Pac. 954, the court said: "It is true that, for some purposes, a body corporate is sometimes regarded as a legal entity, or a fictitious person having a distinct existence. This fiction is not recognized in equity. The reason is clear. Without organization and members, without officers and stockholders, a corporation is but a naked body. It may be authorized to exercise corporate franchises, but is without means or instrumentalities for such exercise. It is clear, therefore, that a body corporate cannot maintain a suit for equitable relief, except as the representative of the stockholders. It necessarily follows that, if the shareholders are without equity, they cannot, through the corporate organization or in its name, obtain relief either for themselves or for the corporation. 'In equity the conception of a corporate entity is used merely as a formula for working out the rights and equity of the real parties in interest, while at law this figurative conception takes the shape of a dogma, and is often applied rigorously, without regard to its true purpose and meaning. In equity the relationship between the shareholders is recognized whenever this becomes necessary to the attainment of justice; at law this relationship is not recognized at all.' 1 Mor. Priv. Corp. 227. At the very outset of the discussion, then, it must be assumed that, in a suit of this nature, the corporation and the individual plaintiffs cannot be separated. It follows that, if the individual plaintiffs are not entitled to relief, as counsel admits, the corporation is not, and the judgment dismissing the bill might very properly be affirmed without further discussion."

In Parsons v. Hayes, 14 Abb. N. C. 419, the court says: "Again, considering that the fundamental position is that Catlow became, in fact, shareholder to the amount of all the capital stock, the following was the relation between the parties: The corporation was the holder of the legal title of the property of the corporation, subject to corporate uses. Excepting this legal title for corporate uses, the shareholders were the parties interested in the property, in fact, owning all of it, excepting the legal title, which, as against them, could be used for corporate purposes. The trustees were the statutory corporation. The shareholders were members or a part of the corporation. The corporation held legal title for the pecuniary benefit of the shareholders, having no beneficial or pecuniary benefit in it. On the claims for the plaintiff, the thing possessed is the right of the corporation to have an action against its trustees for damages for their acts, which it is claimed were wrongful to the corporation. This right, if it existed, was held by the same tenure and for the same purposes that other property would be held. The corporation would have a bare title to it for the beneficial use of shareholders. It seems to be evident that the corporation could not claim as damage to its interests what would be damage to the beneficial interest, when the owners of the latter had consented to the so-called injury."

In Flagler Engraving Machine Co. v. Flagler (C. C.) 19 Fed. 468, the promoters and directors of a corporation put in certain patent rights as part of its capital. Afterwards by fraudulent practices they induced others to buy stock at extravagant prices. The purchasers got control of the corporation, and brought a suit in equity in the name of the corporation against the former directors for mismanagement. The court said that the purchasers might have a right to set aside the sales of stock made to them through fraud, but that they could not, by obtaining control of the company, set up an artificial case and recover through the company what was really their loss individually, and not as stockholders.

In Schilling & Schneider Brewing Co. v. Schneider, 110 Mo. 83, 19 S. W. 67, a corporation brought suit against certain stockholders to have shares which they held declared to be the property of the corporation. The court treated the remaining stockholders as the real parties in interest, and expressly referred to them as such, and held that, as their predecessors in interest could not have complained of the use of moneys of the corporation in acquiring the shares, the stockholders in whose interest the suit was brought could not do so in their own name or in that of the corporation.

The only decision which has been cited to the contrary is Fitzgerald v. Fitzgerald & Mallory Construction Co., 41 Neb. 374, 429, 59 N. W. 838. There it was held that a suit for mismanagement was maintainable in equity as to a transaction in which four-fifths of the stockholders participated and the remainder acquiesced. There had been no change in the stockholders. Suit was brought by one who had acquiesced to recover for the benefit of the corporation. It was said that the action was for the benefit of the corporation, which was a distinct person, and was not affected by the circumstance that the stockholder himself was in no position to complain. But a rehearing was granted, if we may judge from the motion and brief of counsel, on this very ground; and upon rehearing this branch of the case was decided upon an entirely different point, namely, that there had been no acquiescence on the part of the complaining stockholder. Fitzgerald v. Fitzgerald & Mallory Construction Co., 44 Neb. 463, 62 N. W. 899. Hence, while there is no express retraction of the statement in the former opinion, we are satisfied that the court intended to recede from it, and that we are not bound thereby. We reach this conclusion the more readily because the proposition that acquiescence of all the stockholders does not preclude the right of the corporation to relief, as advanced in the first opinion, is contrary to the uniform and long-established course of decisions in all courts, and the understanding of all writers upon the subject. 2 Cook, Corporations, §§ 278, 279; 4 Thompson, Corporations, § 5269; 2 Beach, Private Corporations, § 887; 1 Morawetz, Corporations, §§ 262–264. The adjudications to the same effect as the statements of the text-writers cited are legion.

But it is said the defendant Barber, by reason of his delinquencies, is in no position to ask that the court look behind the corporation to the real and substantial parties in interest. The trial court took this view, saying: "I have come to the conclusion that, there being no equities in this case in favor of Mr. Barber, it is not the duty of this court to look behind the entity of the corporation." We do not think such a proposition can be maintained. It is not the function of courts of equity to administer punishment. When one person has wronged another in a matter within its jurisdiction, equity will spare no effort to redress the person injured, and will not suffer the wrongdoer to escape restitution to such person through any device or technicality. But this is because of its desire to right wrongs, not because of a desire to punish all wrongdoers. If a wrongdoer deserves to be punished, it does not follow that others are to be enriched at his expense by a court of equity. A plaintiff must recover on the strength of his own case, not on the weakness of the defendant's case. It is his right, not the defendant's wrongdoing, that is the basis of recovery. When it is disclosed that he has no standing in equity, the degree of wrongdoing of the defendant will not avail him. This principle can hardly need demonstration; but abundant illustrations are at hand. For instance, a creditor cannot complain of a fraudulent conveyance by his debtor, unless he is injured thereby. Baldwin v. Burt, 43 Neb. 245, 61 N. W. 601. The conduct of the debtor may have been ever so fraudulent. But, if it appears that the creditor has not been prejudiced, he acquires no right merely from the evil intent or unconscientious acts of the debtor. Another example may be seen in Roberts v. Northern Pac. R. Co., 158 U. S. 1, 13, 15 Sup. Ct. 756, 39 L. Ed. 873. In that case a county had granted land to a railroad company without authority, and the grant, under statutes and decisions of the state, was of no effect. Afterwards the county sold the same land to an individual. The court said: "Whatever might be the result in a court of law of a contest between these respective grantees of the county, it may well be doubted whether a court of equity could be successfully appealed to by a purchaser from the county of property worth upward of $200,000 for a nominal consideration of less than $400. If the county had found that it had been overreached in its bargain with the railroad company, or had learned that its grant of these lands was invalid for want of power, and had come into a court of equity, offering to return or account for the consideration received, the condition of things would have been different from what it now is. In such a proceeding, the rescission would have inured to the benefits of the taxpayers of the county; but, under the present claim, the benefit would go to a private party, who bought with knowledge of the county's previous sale, and who admits in his answer that he secured his own grant for a grossly inadequate consideration because of the previous sale." In other words, the wrongdoing of the defendant will not blind a court to the fact that the plaintiff may have no standing in equity.

Counsel say that the court will not look through the corporation to the real plaintiffs, in order to preserve to Barber the fruits of his wrongdoing. If such were the only purpose, we should agree. But the court will bear in mind the real parties in interest, in order to prevent those parties from misusing equitable rules and remedies to obtain relief to which they have no right, and recover back moneys which they paid out voluntarily upon full consideration, without any deception, and to which they can assert no legal claim whatever.

Turning, now, to those items which involve withdrawal of moneys and assets of the company by Barber and conversion thereof to his own use, it must be evident that the foregoing discussion does not apply thereto. So far as its title to property and its right to its moneys and assets are concerned, a clear distinction between the company and its stockholders is always drawn. As we have seen, even if Barber had owned all the stock in the company, he would have had no title to the corporate property, so far as to be able to deal with it in his own rather than in the corporate name. But he was only a majority stockholder. When he withdrew money or assets of the corporation, and converted it to his own use, there was as clear a conversion as if the transaction had taken place between natural persons. If he concealed and covered up these transactions by availing himself of the opportunities afforded him as secretary and manager of the company, and they were not discovered until a change in management resulted in an investigation of the books, we see no reason why the company should not recover the sums so misappropriated. We are therefore of opinion that, so far as relates to the $3,000 converted under pretense of payment to Reynolds and Lovett for services as lobbyists, detailed in the twenty-third finding of the district court, and the conversion of the various collections, detailed in the twenty-eighth finding, the plaintiff should have judgment. We think, likewise, that it ought to recover the interest on the mortgage loan as found in the sixteenth finding. The trial court held that this loan was made in good faith, was duly entered on the books of the company, and properly secured and acquiesced in by the company and its officers. But it further found that a large amount of interest on the loan remained unpaid. There is nothing in the record to justify any inference, much less a finding, that Barber was not to pay all the interest on this loan. He had charge of the books and accounts of the company, and the evidence shows conclusively that he manipulated them in many ways so as to conceal the true nature of his dealings and the actual condition of the transactions between himself and his employer. As to this item of interest, the case stands the same as any other between debtor and creditor.

The same considerations apply to the money withdrawn on November 20, 1899. Unless the claim for back salary is a just and valid one, this was simply a conversion of that amount of money of the company. It becomes necessary, therefore, in this connection, to pass upon the issues as to Barber's claim for unpaid salary, since the company has filed a cross-appeal from that portion of the decree in which such claim is allowed. Undoubtedly, as a general rule, when parties have contracted for performance of certain services for a definite period at a fixed salary, and the employment continues beyond the period agreed upon, in the absence of any new contract, it will be presumed that the employment continued under the same contract and upon the terms originally fixed. Wallace v. Floyd, 29 Pa. 184, 72 Am. Dec. 620; Crane Bros. Mfg. Co. v. Adams, 142 Ill. 125, 30 N. E. 1030. But this presumption must yield to evidence showing a change of terms. Hale v. Sheehan, 41 Neb. 102, 59 N. W. 554; McCullough Iron Co. v. Carpenter, 67 Md. 555, 11 Atl. 176; Commonwealth Ins. Co. v. Crane, 6 Metc. (Mass.) 64. It may be conceded that it would take two to make the new agreement, and that a mere intention on the part of Barber to accept a less sum, or even an express statement by him that he would accept the less sum, would not of itself bind him so to do. Richard Thompson Co. v. Brook (Com. Pl.) 14 N. Y. Supp. 370. In that case certain employés of a corporation agreed among themselves to accept a reduction of salary. The corporation was not a party to the agreement, and it was never communicated to or acted on by the corporation or its directors. Such a case is very different from the one at bar. Here, while there was no action by the corporation expressly, the court has found that from the time Barber as general manager reduced his own salary, along with the salaries of other employés, to the time he ceased to be an officer of the company, he drew his salary from time to time substantially on the basis of the reduction; and the evidence is clear and convincing that he took the moneys withdrawn in full satisfaction of his claim for salary, and had no thought of claiming more until his right to withdraw the $2,200 was challenged after the new management took charge. We think these circumstances are sufficient to show that the company relied on his voluntary action in reducing his own salary, and took no express action thereon, because none was necessary, and that it was understood by both parties that his salary was that which he had voluntarily fixed upon. In Shade v. Sisson Mill & Lumber Co., 115 Cal. 357, 47 Pac. 135, the corporation rendered statements monthly to an employé, in which he was credited with a less salary per month than he should have received. It was held that the employé, by acquiescence in these statements so rendered him, was estopped to claim afterwards a salary in excess of that for which he was given credit. So long as Barber's reduction of his own salary was carried out by himself for a long series of years, and even at the time when he withdrew the $2,200 he did not claim the right to withdraw any such sums as would be due to him if his present claims were allowed, we see no ground whatever on which to sustain the judgment in his favor in this behalf. Hence we are of opinion that the company should recover the item of $3,000 converted on April 17, 1895, the item of $237.37 for collections unaccounted for, the unpaid interest on the mortgage loan, amounting at the date of the decree in the lower court to $1,510, and the item of $2,200 withdrawn on November 20, 1899.

It is therefore recommended that the decree of the district court be reversed, and the cause remanded, with directions to enter a new decree in favor of the plaintiff and against the defendant Barber for the several sums last above stated and interest thereon at the rate by law provided. We further recommend that each party pay his own costs in this court.

BARNES and OLDHAM, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause is remanded, with directions to enter a new judgment in favor of the plaintiff and against the defendant Barber in accordance with said opinion. It is further ordered that each party pay his own costs in this court.

PARKER v. STATE.

(Supreme Court of Nebraska. Feb. 17, 1903.)

CRIMINAL LAW—CREDIBILITY OF WITNESS—CONFLICTING EVIDENCE—REVIEW—MISCONDUCT OF COUNSEL—SHOOTING WITH INTENT TO KILL.

1. The credibility of witnesses and the probative value of their testimony are matters which it is the peculiar function of the jury to determine.

2. A verdict based upon substantially conflicting evidence will not be set aside by this court.

3. An appeal for conviction, based altogether upon the evidence, however fervent it may be, is not an abuse of the privilege of advocacy.

4. Ordinarily a party who did not promptly object to an argument alleged as misconduct will be held to have waived his right to complain.

5. But where the misconduct of counsel is so flagrant and of such a character that neither a complete retraction nor any admonition or rebuke from the court can entirely destroy its sinister influence, a new trial should be awarded, regardless of the want of an objection and exception. Chicago, B. & Q. R. Co. v. Kellogg, 76 N. W. 462, 55 Neb. 748.

6. A person who has been found guilty of shooting with intent to kill cannot found a valid claim to judicial leniency upon his inferior marksmanship.

(Syllabus by the Court.)

Error to district court, Boyd county; Harrington, Judge.

Walter W. Parker was found guilty of shooting with intent to kill, and brings error. Affirmed.

W. G. Sears and W. T Wills, for plaintiff in error. Frank N. Prout, Atty. Gen., Norris Brown, Dep. Atty. Gen., and William B. Rose, Asst. Atty. Gen., for the State.

SULLIVAN, C. J. Section 16 of the Criminal Code is as follows: "If any person shall maliciously shoot, stab cut, or shoot at any other person, with intent to kill, wound, or maim such person, every person so offending shall be imprisoned in the penitentiary not more than twenty years nor less than one year." Upon an information charging a violation of this section the defendant, Parker, was tried, found guilty, and sentenced to imprisonment in the penitentiary for a term of ten years.

The grounds upon which he claims a reversal of the judgment are (1) that the evidence is insufficient to sustain the verdict, (2) misconduct of the county attorney in addressing the jury, and (3) that the sentence is excessive.

The defendant quarreled with his father-in-law, Peter Hansen, and intentionally shot him, at a livery stable in the village of Spencer, in Boyd county. This is conceded, but whether the shooting was malicious, or done as a measure of necessary self-defense, is a point upon which the evidence is in irreconcilable conflict. The credibility of the witnesses and the probative value of their testimony were matters which it was the peculiar function of the jury to determine, and we see no reason for interfering with their determination or to seriously doubt its correctness.

The alleged misconduct of the prosecuting attorney consisted of an appeal for conviction in which the duty of the jury to the state, to society in general, and particularly to the people of Boyd county, was pointed out in forcible and impressive language. It seems probable from affidavits filed by some of the jurors that counsel based his claim for conviction altogether upon the evidence, and that he did not at all exceed the limits of legitimate discussion. But, in any view of the matter, it is certain that he committed no such serious fault as to make it the duty of the court to set aside the verdict. No objection was interposed by counsel for defendant at the time the remarks were made, and they were therefore neither approved nor condemned by the trial court. This being so, the following extract from the opinion in Chicago, B. & Q. R. Co. v. Kellogg, 55 Neb. 748, 76 N. W. 462, is pertinent: "In this case there was no formal objection, and consequently no ruling, or contumacious refusal to rule, which we are authorized to review. Had the court, in response to a proper objection, vigorously condemned the remarks of counsel, we think they would have left no prejudicial impression on the minds of the jury. By prompt action the defendant's counsel might have obtained an effective antidote for the poison in Shafer's speech; but he failed to act, and is therefore not in an attitude to have his complaint now considered. We do not, however, wish to be understood as holding that a rebuke from the court, or even a complete retraction by the offending counsel, is in all cases of this kind a sovereign remedy. If the transgression be flagrant—if the offensive remark has stricken deep, and is of such a character that neither rebuke nor retraction can entirely destroy its sinister influence—a new trial should be promptly awarded, regardless of the want of an objection and exception."

In our opinion, the sentence imposed is not excessive. If the defendant's aim had not been faulty, he might have been sentenced to hang. A claim to leniency, based on inferior marksmanship, is not a very meritorious or persuasive claim. The district court had a large discretionary power, and we cannot regard a sentence imposing half the maximum penalty as an abuse of discretion.

The judgment is affirmed.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1718.

CERTIFICATE OF SERVICE

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